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STATUS OF ATM'S UNDER STATE BRANCHING LAWS

HEARINGS

BEFORE THE

COMMITTEE ON
BANKING, HOUSING, AND URBAN AFFAIRS
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 2898

TO AMEND SECTION 5155 OF THE REVISED STATUTES

TO PRESERVE AND PROMOTE THE ABILITY OF NATIONAL BANKS TO PARTICIPATE IN SHARED AUTOMATED TELLER MACHINE NETWORKS AND TO PROTECT CONSUMER BENEFITS OF SHARED ATM'S

SEPTEMBER 19 AND 20, 1984

Printed for the use of the Committee on Banking, Housing, and Urban Affairs

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STATUS OF ATM'S UNDER STATE BRANCHING LAWS

WEDNESDAY, SEPTEMBER 19, 1984

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
Washington, DC.

The committee met at 10 a.m., in room SD-538, Dirksen Senate Office Building, Senator Slade Gorton presiding.

Present: Senators Gorton, Hecht, and Trible.

OPENING STATEMENT OF SENATOR GORTON

Senator GORTON. The purpose of this hearing is to hear testimony on S. 2898, the Banking Convenience Act of 1984, introduced by Senator Trible and cosponsored by Senator Humphrey. I want to thank the witnesses for coming to appear before us today.

The problem that gives rise to these hearings is a collision between new technology and old law. In a recent decision, a court held that the definition of "branch banks" contained in the McFadden Act extended to the automatic teller machine [ATM], even if the machine was not owned by the banks in question. Indeed, the statutory language is quite supportive of this conclusion, although it is questionable whether this could conceivably have been the intent of Congress when it drafted the McFadden Act, before I was even born.

The situation is complicated, both by desires to avoid back door circumvention of interstate banking bans, and by genuine ambiguity over the scope of State versus Federal authority in areas that were virtually unforeseen only a few years ago, let alone in 1927.

There must be, however, some resolution of these problems. In the first place, the consumer benefits provided by ATM's are too dramatic and too clear to our citizens to allow us to deny them now. In my own State, several hundred banks of all descriptions belong to shared ATM networks of both regional and national scope and regard their participation in these networks as critical to their ability to survive. The largest grocery store chain in Washington State is moving to implement an ATM network with 150 affiliated banks and savings and loan institutions. It has become a constituency I could not possibly ignore; nor, given my longstanding interest in consumer protection legislation, would I want to. Should it appear that the continued existence of networks in my State is in jeopardy, I would not be inclined to sit back and do nothing while the courts play out the issue.

Furthermore, we in Congress might as well accustom ourselves to revisiting these issues more frequently than has been the case in the past. Given the pace of change in this area in the last 15 years, what will the next decade bring? Surely, those changes will be at least as dramatic.

I would like to commend Senators Trible and Humphrey for their efforts in this complicated but extremely important area. I am not, at present, a cosponsor of S. 2898, but I am eager to learn from the testimony to be presented today, and I hope these hearings will move us closer to a resolution of the problem.

Senator Hecht.

Senator **Hecht**. No statement.

Senator **Gorton**. Senator Trible, the sponsor, is here.

OPENING STATEMENT OF SENATOR TRIBLE

Senator **Trible**. Mr. Chairman, I thank you for your excellent statement. I must say at the outset I didn't realize the McFadden Act was such an ancient law.

Senator **Gorton**. That really boggles your mind, doesn't it?

Senator **Trible**. Perhaps it is time to reexamine that law in all of its respects.

Mr. Chairman, let me say my purpose in introducing this legislation is quite simple and straightforward. My purpose is to preserve and promote the ability of national banks to participate in shared automated teller machine networks and to protect the substantial consumer benefits of shared ATM's that are now jeopardized by a recent Federal court decision.

It is my hope today as we hear from many distinguished witnesses that we can examine the substantial benefits that accrue to the public, to the financial services industry generally, and to our economy; that we can take a hard look at the relevant Federal laws and regulations and the impact of this decision and determine after hearing the testimony today and tomorrow what kind of action ought to be undertaken to promote and preserve the consumer benefits that are real and substantial.

I thank you, Mr. Chairman, and I look forward to the testimony today.

[Copy of proposed bill S. 2898 follows:]

II

98th CONGRESS
2d Session

S. 2898

To amend section 5155 of the Revised Statutes.

IN THE SENATE OF THE UNITED STATES

August 1 (legislative day, July 30), 1984

Mr. Trible (for himself and Mr. Humphrey) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

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A BILL

To amend section 5155 of the Revised Statutes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Banking Convenience Act of 1984".

Sec. 2. Section 5155 of the Revised Statutes (12 U.S.C. 36) is amended by adding at the end thereof the following:

"(i)(1) Notwithstanding any other provision of this section or of a similar State law, a national bank may share, or permit its customers to use, an automated device that is not established by that bank, and such automated device shall not be considered a branch of that bank within the meaning of subsection (f) of this section.

"(2) For the purpose of this subsection—

"(A) an automated device is established by a national bank only if it is owned or rented by that bank;

"(B) an automated device is not established by a national bank if the bank is assessed transactional fees or similar charges for its use; and

"(C) the term 'automated device' includes, without limitation, automated teller machines, customer bank communication terminals, point-of-sale terminals, and cash dispensing machines.".

Senator GORTON. Thank you.

I have statements which have been submitted on behalf of Marine Midland and on behalf of Plus System, Inc., both of which will be included in the record.

MARINE MIDLAND BANK, N.A.
140 Broadway
New York, New York 10015

STATEMENT OF
MARINE MIDLAND BANK, N.A.
IN SUPPORT OF THE
BANKING CONVENIENCE ACT OF 1984 (S. 2898)

Marine Midland Bank, N.A. supports and encourages the passage of S. 2898, the "Banking Convenience Act of 1984", introduced by Senator Trible and Senator Humphrey on August 1, 1984.

Background

The Independent Bankers Association of New York, Inc. v. Marine Midland Bank, N.A., the United States District Court for the Western District of New York enjoined Marine Midland, a national bank, from allowing its customers to make withdrawals and deposits and obtain credit card cash advances at an automated teller machine (ATM) owned and operated by Marine Midland's co-defendant, Wegmans Food Markets, Inc. and located in a Wegmans supermarket in Canandaigua, New York.

The Court concluded that this use of the Wegmans ATM made the ATM a "branch" of Marine, which Marine could not establish under Federal law and the New York branching restrictions that Federal law incorporates. The Court's decision has been appealed.

Effects of Decision

Unless S. 2898 is enacted, affirmance of the District Court's decision could severely damage national banks' ability to compete with state-chartered banks, thrift institutions and others in providing electronic funds transfer (EFT) services through shared ATM networks. Affirmance could also jeopardize the health and continued existence of those networks. Further, the decision could deprive consumers of the convenience (and reduced costs) shared networks make possible and, by largely precluding national bank participation in these networks, reduce their banking alternatives.

S. 2898 will ratify established interpretations of the Comptroller of the Currency that allow national banks to participate equally with other institutions in shared ATM networks.

Effect on National Banks

If the District Court's conclusion that an ATM used but not owned or rented by a national bank is a "branch" of the bank stands, national banks cannot participate fully in multi-state shared ATM networks (and 21 of the 24 largest newtworks have ATMs in more than one state), because Federal law prohibits national banks from branching across state lines. State banks and thrift institutions, however, generally can share ATMs in other states.

Also, national banks could not fully participate in single-state networks (or use ATMs of multi-state networks located in its home state) if that state's branching laws are restrictive even if its banking regulators do not consider ATMs to be "branches". The decision could therefore magnify the effect of restrictive and anti-competitive provisions of state branching laws.

Effect on Shared Networks

National banks could be compelled to withdraw from, or reduce their participation in, some or all of the approximately 200 local, regional and national shared ATM networks in the United States. Networks spread start-up and operating costs too large for most banks to absorb alone among a number of participants, and their large transaction volumes and economies of scale make lower transaction costs possible. National bank withdrawal from those networks could seriously weaken the networks; and some might have to disband, which would obviously adversely affect the other participants in the network.

Effect on Consumers

A consumer whose bank participates in shared networks can conveniently conduct transactions with his or her bank at more places than the bank could provide alone - nearer home, nearer work, and in some cases across the country. The bank customer also enjoys lower per-transaction costs.

The rapid growth of shared networks demonstrates that their benefits are increasingly important to consumers. A national bank precluded from providing those beneifts would be at a serious disadvanatage in attracting new customers and retaining old ones.

If national banks withdraw from shared networks, some of these networks may have to pass its increased costs on to consumers. Also, consumers will have fewer locations at which to transact business.

Strictly applied, the District Court's decision could also jeopardize the development of other kinds of consumer-oriented EFT services. Among these are point-of-sale systems, where consumers can use debit cards instead of cash or a check to pay merchants for goods or services, and home banking systems.

Effect on The National Banking System

National banks can justifiably perceive shared network services as an essential competitive tool. Some of them, to avoid the potential effects of the District Court decision (and perhaps to avoid other limitations thrift institutions and non-depository institutions do not suffer), might take the extreme step of converting to state banks or (as experts have recently recommended) to thrift institutions.

It would be at the least ironic if the District Court's static interpretation of a 1927 statute specifically intended to prvent the diminishment or destruction of the national banking system by allowing national banks to establish banking facilities on an equal footing with state banks were to have precisely that result.

Conclusion

S. 2898 can forestall the potential adverse effects of the District Court's decision on national banks' ability to compete on an equal basis with state banks, thrift institutions and non-depository institutions, prevent damage to shared networks and help assure that shared networks will continue to provide increased convenience and lower costs to consumers. Marine Midland Bank therefore strongly urges the passage of S. 2898.

September 13, 1984

Comments of Plus System, Inc. on S.2898, "Banking Convenience Act of 1984"

SUMMARY OF COMMENTS

By these Comments, Plus System, Inc. ("PSI") endorses S.2898, The Banking Convenience Act of 1984, as a proper and necessary legislative remedy to an erroneous Federal District Court decision on the sharing of automated teller machines ("ATMs") by national banks. PSI opposes amendments to the bill, and alternative legislative solutions, that go beyond a narrow and precise codification of Comptroller of the Currency rules and interpretations on interstate ATM sharing by national banks.

Plus System, Inc. is a membership corporation composed exclusively of depository financial institutions, such as national banks, bank holding companies, savings banks, and savings and loan associations. PSI was formed for the sole purpose of developing and operating a nationwide, shared system of automated teller machines under the PLUS SYSTEM service mark. This ATM network permits the traveling consumer possessing an account at any PSI member financial institution to obtain access to that account at any other member institution's ATM. Since its incorporation in 1981, PSI has established the most extensive network of its kind in the country. Today, approximately 1,000 member financial institutions in 47 states share over 3,300 PLUS SYSTEM ATMs that offer 23 million cardholders electronic access to their depository accounts. The PLUS SYSTEM network has achieved unparalleled consumer acceptance: each month PSI processes over 250,000 transactions, most of which are cash withdrawals by consumers while traveling away from home.

PSI member financial institutions established the PLUS SYSTEM network at a cost of tens of millions of dollars and in reliance on long-standing federal court precedents and regulations that consistently have interpreted the branch banking restrictions of the McFadden Act to apply only to ATMs *established*, i.e., owned or rented by a particular bank. Now, the April 6, 1984 decision of the U.S. District Court for the Western District of New York, in *Independent Bankers Association of New York State, Inc. vs. Marine Midland Bank*, would overturn these previously undisputed ground rules based on an erroneous reading of the McFadden Act and a total misunderstanding of the electronic funds transfer environment in which the case arose. The District Court confused the vitally different practices of bank *branching* and ATM *sharing*, and in so doing it jeopardizes the very existence of the national PLUS SYSTEM network. Specifically, the District Court decision can be read as holding that a national bank engages in "branch banking" when its customers merely use an ATM owned by another institution. If such a broad reading were affirmed, the approximately 400 PSI members that are national banks would be precluded from participating in the PLUS SYSTEM network within the Second Circuit; and if the regulations of the Comptroller of the Currency were revised to accord with the District Court's decision, the same 400 banks would be barred from participating in *any* shared ATM system on an interstate basis.

Since the McFadden Act prohibits interstate branching by national banks, under the lower court's erroneous decision any ATM that is used by customers of a national bank and that is located in another state would become a "branch" of the card-issuing bank, and as such unlawful under the McFadden Act. This result would preclude national banks from participating in any multi-state shared system. Since national banks are essential to the PSI network, their inability to participate in it would eviscerate the national PLUS SYSTEM program. For all these reasons, PSI has petitioned, and has been granted leave, to participate in the Marine Midland case as amicus curiae.

Plus System, Inc. supports the adoption of S.2898, The Banking Convenience Act of 1984. Specifically, we believe that this bill narrowly and precisely reverses the effect of the Marine Midland decision. If adopted, the proposed legislation would merely codify the rulings and interpretations of the Comptroller of the Currency -- the very authority that permitted national banks to participate in shared ATM networks. In short, the bill would return financial institutions and consumers alike to the status quo ante, by legislatively endorsing a widespread practice that has been countenanced for more than ten years by the courts and the Executive Branch. As a corporation formed for the sole purpose of operating a nationwide shared ATM system, PSI does not believe it prudent to confuse the issue further by introducing extraneous amendments that do more than simply codify the Comptroller's regulations and interpretations on ATM sharing. This bill and this issue, in short, are not appropriate vehicles to address interstate deposit taking or enlarged state authority over national banks, both of which are beyond the scope of the narrow issue addressed by the Marine Midland court and this proposed legislation.

A. The PLUS SYSTEM Shared Network

PSI is owned and controlled by 34 "proprietary" members, all of which are depository financial institutions or their holding companies that have exclusive ownership and voting rights in the corporation; 20 of these proprietary members are national banks. (A list of these members is attached as Exhibit A to these comments.) In addition, approximately 960 other financial institutions, including national banks, bank holding companies, savings banks, savings and loan associations, credit unions, and industrial banks, are "sponsored" members of PSI and as such participate in its ATM network but do not have proprietary or voting rights in the corporation. Of the 960 sponsored members, 374 are national banks. PSI's approximately 1,000 members are dispersed throughout all but three states, and collectively they have assets in excess of $450 billion.

Consumers who bank at PSI member financial institutions enjoy an unparalled benefit: they can obtain electronic access to their account at any other PSI member institution's ATM, whether that machine is located around the block or 3,000 miles away. The customer may withdraw cash from a demand deposit or savings account; transfer funds between a demand deposit and savings account; and determine the balance in the demand deposit account or savings account. (The customer may not use the PLUS SYSTEM network to make deposits.) These transactions are conducted using a plastic "debit" card that is issued by the customer's bank (the "issuing bank") and that prominently bears the bank's name; the card also bears, generally on the back, the small PLUS SYSTEM service mark. In addition, the customer may obtain a cash advance from a prearranged line of credit using a plastic "credit" card, such as one displaying the "Visa" or "MasterCard" service marks. Such a credit card also bears the PLUS SYSTEM service mark as well as the name of the issuing bank.

It is important to note that these ATM functions such as cash dispensing, balance inquiries, and transfers between accounts reflect a newer, more efficient electronic version of an older manual industry custom. What is new is the way these functions are provided, not the bare fact that they are being provided at all.

For at least 15 years before the advent of shared ATM systems the same bank customers using the same banking card* (either a credit card or, later, the bank's own debit card) could obtain a cash advance by presenting the card in person to an out-of-state bank that was a member of the same credit card association (such as Visa or MasterCard) as the issuing bank. The customer also could obtain a cash advance from any other out-of-state bank that had agreed contractually with the card issuing bank to provide this service to the issuer's customers. In addition to arranging for cash advances on credit cards, banks routinely arranged (and still do today) for their customers to cash their personal checks at out-of-state banks.

These interbank arrangements are known as "agent" relationships, and along with the more comprehensive "correspondent" services (such as check clearing, loan participations, and electronic data processing) are well known, common, and long ago accepted as necessary components of the banking industry. These practices have never been deemed "branch banking" by national banks.**

Sharing of ATMs by national banks or other types of financial institutions is nothing more than the electronic equivalent of these well-known agent and correspondent-type banking relationships. In this limited sense, the traditional manned facilities and the modern electronic ATM serve the same narrow function: they permit the customer of one bank to obtain from another bank cash on a line of credit or from a depository account. In both cases, the brick-and-mortar banking facility and the ATM are established by one bank and then shared with others. Until the remarkable Marine Midland decision from the Western District of New York, it had long been held, based on Indep. Banker's Assoc. of America v. Smith, 534 F.2d 921, 948 (D.C. Cir.), cert. denied 429 U.S. 862 (1976) and Interpretive Rulings of the Comptroller of the Currency, that a national bank was free to operate in this way; that is, to share with other banks ATMs it had established (i.e. owned or rented) without causing those other banks to be engaged in branch banking.

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* Of course, since this was before the introduction of consumer electronic services, there was no personal identification number associated with the card. Such a number, a "PIN," must be used by the customer to gain access to an ATM.

** See United States v. Citizens and Southern National Bank, 422 U.S. 86, 115 (1975).

Each ATM in the PLUS SYSTEM network is established and controlled in a manner consistent with the Smith decision, i.e. by only one depository institution and in a manner that conforms to relevant federal and state laws and regulations. Neither PSI nor any member has any proprietary interest in the ATMs established and operated by any other PSI member. Rather, ATMs are established by one member depository institution in accordance with state and federal branching requirements and then are shared with other PSI members. Each ATM is generally identified only with the name of the bank that deployed it; and if the ATM is linked to the PLUS SYSTEM network, it will bear a five inch square decal depicting the PLUS SYSTEM service mark.

Many PSI member institutions also share their ATMs on a local basis with other financial institutions that are not members of PSI. Indeed, ATM sharing actually is required by state compulsory sharing laws.* These "local" or "regional" shared networks have been operating for many years, and in fact were harbingers of national shared ATM systems such as the one operated by PSI. Indeed, the PLUS SYSTEM service mark was developed by Rocky Mountain BankCard System, a division of The Colorado National Bank of Denver, for use in a multi-state regional network in the western United States. (Rocky Mountain BankCard System itself was established in 1967.)

Since ATM sharing began more than ten years ago, it has become widespread -- eloquent testimony to the consumer convenience it provides at a cost below that of the earlier manual system. For example, as of August 1983, over 16,000 of the total of 40,000 ATMs in the country (i.e. 40%) were shared, and there were approximately 200 local or regional shared networks.** Approximately 50 million ATM access cards (almost one-half of all those in the country) carried the trademarks of, and were useable in, shared networks; and more than one-half of the commercial banks in the country belonged to shared ATM networks.** The proliferation of shared ATM networks has been accompanied by a growing consumer acceptance of ATMs: 40% of bank consumers use ATMs in conducting their banking business.*

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* See generally, Penney & Baker, The Law Of Electronic Fund Transfer Systems, Par. 22.02[3] (1981). Approximately 25 states have such compulsory sharing statutes, See id., 1983 Cum. Supp. Par. 22.02[3], at S22-21.

** Felgran, "Shared ATM Networks: Market Structure and Public Policy," in New England Economic Review 26 (Federal Reserve Bank of Boston, Jan./Feb. 1984).

PSI member institutions view -- and have extensively advertised -- the national PLUS SYSTEM network as an important value-added convenience to the traveling consumer. Consumers have responded accordingly: the PSI network now processes over 250,000 transactions per month from its 23 million cardholders. All these are transactions conducted by a customer of an issuing PSI member bank at an ATM established and operated by another PSI member bank. Four-fifths of all transactions through the network are cash withdrawals or cash advances. Of course, most transactions at ATMs linked to the PLUS SYSTEM network are still conducted by the ATM owner's customers or by customers of other non-PSI member banks that share the ATMs on a local or regional basis.

In general, a transaction between any two of the 1,000 PSI members (i.e. a transaction by a customer of PSI member A at an ATM established and operated by PSI member B) will be electronically routed between the two financial institutions via a central computer link, the PSI "Switch." The card issuing member bank pays a "switch fee" of $0.25 to PSI for each of its customer's transactions routed through the Switch. In addition, for cash withdrawals, the issuing member bank pays an "interchange fee" of $0.50 to the PSI member bank that operates the ATM being used by the issuer's customer. (The payment to the ATM owner is lower for balance inquiries.) The switch fee is intended to meet PSI's operating costs, but in fact it only partially compensates PSI for the development and operational costs associated with the nationwide PSI system.

B. The Effect of the Adoption of S.2898 on Plus System, Inc.

The adoption of S.2898 in the form originally proposed would ensure the continued operation and growth of the PLUS SYSTEM network, the vital participation of the 400 national banks that are members of PSI, and the continued delivery of efficient, valuable banking services to the 23 million PLUS SYSTEM cardholders who increasingly expect to have electronic access to their funds wherever they travel throughout the United States.

Stated differently, the failure to adopt S.2898, together with the aberrant decision of the U.S. District Court in the Marine Midland case, could have a devasting effect on the PLUS

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* Felgran, at p. 26.

** EFT Report, March 28, 1984 at page 3.

SYSTEM network, all its 1,000 member financial institutions, and the millions of consumers who rely upon its shared ATM network. These effects would be the direct result of a conclusive judicial decision or Comptroller regulation that the mere use by a customer of a national bank of an ATM owned by another bank constitutes "branch banking" by the card-issuing national bank. This would prevent the approximately 400 PSI members that are national banks from participating in the national PLUS SYSTEM network or, indeed, in any shared ATM system on an interstate basis. Such a result would be a retrogression, an attempt to retard the growth of an efficient electronic financial delivery system, and an endorsement of limited, costly, and outdated consumer banking services. In short, the extension of the Marine Midland principle would have widespread implications:

First, the consumers holding cards issued by PSI's national bank members could not use the national PLUS SYSTEM network. This would deprive these consumers of the speed, convenience, and efficiency of national electronic access to their funds, and it would force them to rely instead on the decades-old manual practice of funds access, assuming this too were not also "branch banking."*

Second, the potential loss to the PLUS SYSTEM network of 400 national bank members, some of whom (such as Bank of America and Chase Manhattan) are PSI's largest members, could cause other types of financial institutions, such as savings banks or savings and loans, to withdraw from the network entirely. Without national banks, the entire network may not be cost effective or commercially attractive to its members.

Third, the PSI shared system has important economies of scale that would be seriously impaired. In the PSI network, the larger the number of transactions through the PSI switch the lower the cost per transaction. Obviously, if national banks and their customers could not use the network, tens and perhaps hundreds of thousands of transactions would be lost, causing unit costs to soar. If the costs become prohibitive, the system and its attendant consumer benefits would have to be abandoned.

Fourth, the competitive balance between national and state banks could be seriously undermined because national banks could not share terminals across state lines, yet there would be no similar restriction on state banks. Furthermore, since federal savings and loan associations and credit unions are expressly permitted to deploy terminals across state lines,* national banks would be singularly barred from offering their customers a valuable service available from their competitors.

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* Of course, agent and correspondent banking practices would not be "branch banking." Consumers, then, could continue to visit the teller window in a brick and mortar facility of an agent bank to cash a check. Yet, under an extension of the Marine Midland principle, an ATM owned by the same agent bank would be a "branch," and therefore unavailable to the traveling consumer.

Fifth, Plus System, Inc. and its proprietary members, as well as to a lesser extent its sponsored members, would risk the loss of tens of millions of dollars they have invested in the development, operation, and promotion of a sophisticated nationwide consumer electronic funds transfer system. This system has been built in reliance on long-standing federal court precedents, such as Independent Banker's Assoc. of America v. Smith, 534 F.2d 921 (D.C. Cir.) cert. denied, 429 U.S. 862 (1976), as well as regulations of the Comptroller of the Currency. The District Court in Marine Midland has jeopardized PSI members' investment by disregarding these precedents and by confusing branching with the factually and legally distinct practice of sharing.

Sixth, the considerable uncertainty caused by the Marine Midland decision may well discourage PSI member investment in enhanced shared ATM technology. With the present investment now newly at risk, PSI and its member institutions must procede with great care in making further investments pending clarification of the scope and breadth of the Marine Midland decision. This would be a tragic result for the traveling consumer because shared ATM systems such as the PLUS SYSTEM network have proved that they can provide an efficient, reliable, low cost, accurate, and convenient means to obtain electronic access to the consumer's account. Without corrective legislation, the consumer could lose these proven benefits, and no doubt future enhancements and innovative banking services would be discouraged.

Seventh, smaller financial institutions, who now enjoy the same benefits of the national PLUS SYSTEM program as their much larger competitors, would be deprived of a vital competitive "equalizer" -- consumer access to accounts at any one of 3,300 ATMs nationwide. The elimination of interstate ATM sharing would be more harmful to these smaller banks than to larger ones.

C. The Effect of the Adoption of Amendments Proposed by the Conference of State Bank Supervisors

Finally, PSI strongly opposes the amendments proposed by the Conference of State Bank Supervisors ("CSBS"). Far from merely codifying the Comptroller's rules on sharing by national banks, the CSBS amendment would constitute Congressional consent to new authority by the states over the operations of national banks. Specifically, the CSBS proposal to exercise state authority over the "location, ownership, operation and permissible functions" of national bank ATMs would give more regulatory authority to the states than they currently have. What is the basis for new State authority over the functions, operations, and ownership of a national bank's ATMs? CSBS apparently asks for competitive uniformity -- not competitive equality -- between state and national banks on their terms alone and without further Congressional oversight. Of course, federal savings and loan associations and credit unions would not be subject to such state authority. The simple question of legislative endorsement of ATM sharing on precise terms previously approved by the courts and the Comptroller is hardly the appropriate occasion to address this complex issue.

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* 12 USC Sec. 1464(b)(1)(F), 12 C.F.R. Sec. 545.4-2(c) (1983) (S & Ls); 12 U.S.C. Sec. 1757 (15), 47 Fed. Reg. 33, 950 (1982) (Credit Unions).

Moreover, the CSBS Amendments would introduce new legal uncertainty on interstate sharing of ATMs. Several states (including Florida, Massachusetts, and Connecticut) have in the past tried to limit such sharing by statute, but have abandoned the effort. Under the Commerce Clause of the Constitution, a state may not bar interstate financial activities unless Congress expressly consents to such a restraint -- "by confering upon the states an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." Lewis v. B.T. Investment Managers, 447 U.S. 27, 44 (1980). As of this time Congress has not consented to such state restraints on interstate sharing of ATMs. The CSBS Amendments, giving states control over "operation" of ATMs, might be construed as congressional consent to state prohibitions on interstate sharing. We think that such a reading would be at odds with the Supreme Court's prior Commerce Clause decisions, but the question is not clear beyound doubt. Hence, interstate ATM sharing systems (such as PSI) would at least face a period of uncertainty while the courts resolved the issue.

Furthermore, by going beyond a mere codification of the Comptroller's sharing rules, the CSBS amendments introduce other ambiguities and business uncertainties that will spark litigation and discourage ATM sharing by national banks. For example, CSBS does not merely adopt the branch standard previously articulated. Instead, it provides that an automated device is only "presumed" not to be established by a national bank if it pays transaction fees. Why "presumed?" This raises an issue bound to be litigated.

In short, CSBS raises the entirely new issue of greater state authority over the activities of national banks. This is beyond the scope of the problem to be resolved by S.2898 and as such it should be rejected.

In conclusion, Plus System, Inc. endorses S.2898 for the simple reason that it assures PLUS SYSTEM financial institutions that the legal ground rules for ATM sharing continue to be precisely the same as they were before the aberrant and erroneous April 6, 1984 Marine Midland decision. With this assurance, consumers will continue to enjoy the substantial benefits of widespread electronic access to their depository accounts.

APPENDIX A

Affiliated Bankshares of Colorado, Inc.
Boulder, Colorado

American Security Bank, N.A.
Washington, D.C.

The Arizona Bank
Phoenix, Arizona

BancOhio Corporation
Columbus, Ohio

Bank of America, NT & SA
San Francisco, California

Bank of Hawaii
Honolulu, Hawaii

Bankers Trust of South Carolina
Columbia, South Carolina

Central Bank of Denver
Denver, Colorado

Chase Manhattan Bank, N.A.
New York, New York

The Colorado National Bank of Denver
Denver, Colorado

The Connecticut Bank and Trust Company
Hartford, Connecticut

Continental Illinois National Bank
  and Trust Company of Chicago
Chicago, Illinois

First Bank System, Inc.
Minneapolis, Minnesota

First City Bancorporation of Texas
Houston, Texas

The First National Bank of Atlanta
Atlanta, Georgia

First National Bank of Boston
Boston, Massachusetts

First National Bank of Omaha
Omaha, Nebraska

First Security Corporation
Salt Lake City, Utah

First Tennessee Bank, N.A.
Memphis, Tennessee

Fourth National Bank and
  Trust Company
Wichita, Kansas

Harris Trust and Savings Bank
Chicago, Illinois

The Indiana National Bank
Indianapolis, Indiana

Liberty National Bank and
  Trust Company
Oklahoma City, Oklahoma

Lincoln First Bank, N.A.
Rochester, New York

Michigan National Corporation
Bloomfield Hills, Michigan

National Bank of Alaska
Anchorage, Alaska

NCNB National Bank
Charlotte, North Carolina

Pacwest Bancorp
Milwaukie, Oregon

Philadelphia National Bank
Philadelphia, Pennsylvania

Rainier National Bank
Seattle, Washington

Southeast Bank, N.A.
Miami, Florida

Sunwest Bank of Albuquerque, N.A.
Albuquerque, New Mexico

United Missouri Bank of
  Kansas City, N.A.
Kansas City, Missouri

Valley Bank of Nevada
Las Vegas, Nevada

Senator GORTON. Our first panel consists of Mr. Mancusi, from the Comptroller of the Currency; and Mr. Malarkey, who is the State Bank Commissioner of Delaware but who is speaking on behalf of the Conference of State Bank Supervisors.

I note, gentlemen, that if all the witnesses were to read the testimony we have before us we would be here until 1 or 2 o'clock just listening to that reading. I assure that all of the members of the committee are literate and capable of reading them for themselves. I would appreciate your summarizing your statements and all of them will be included in the record in full as if read.

With that, Mr. Mancusi, you may proceed.

STATEMENT OF MICHAEL A. MANCUSI, SENIOR DEPUTY COMPTROLLER FOR NATIONAL OPERATIONS, OFFICE OF THE COMPTROLLER OF THE CURRENCY

Mr. MANCUSI. Thank you, Mr. Chairman. In keeping with your request, I would like our statement entered into the record and I do have several brief comments that I would like to make that hopefully will summarize that statement.

[The complete statement follows:]

STATEMENT OF

MICHAEL A. MANCUSI
SENIOR DEPUTY COMPTROLLER OF THE CURRENCY

BEFORE THE
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS
UNITED STATES SENATE

SEPTEMBER 19, 1984

Mr. Chairman and members of the Committee, I appreciate the opportunity to express the views of the Comptroller's Office on S. 2898 -- The Banking Convenience Act of 1984. These comments do not necessarily represent the views of the Administration. This bill would preserve the ability of national and state member banks to participate in shared automated teller machine (ATM) networks, and protect the widely-accepted consumer benefits which are now placed in jeopardy because of the recent district court decision in Independent Bankers Association of New York State v. Marine Midland Bank.

S. 2898 provides that a shared ATM would not be considered a branch of a national bank if the ATM is not owned or rented by that bank. Thus, it would preserve the status quo by codifying the current interpretation of law that led to national and state member bank participation in shared ATM networks. S. 2898 is a timely and important piece of legislation which reverses the broad and harmful precedent set in the Marine case. Because of the importance of ATMs to consumers, and because of the detrimental effect that the Marine decision could have on ATM networks, I strongly support S. 2898 and recommend its prompt passage.

Growth of ATM networks

As you know, in 1976, the District of Columbia Circuit Court held in IBAA v. Smith that an ATM, which is owned or rented by a national bank, is a branch of that bank, and therefore restricted by applicable state branching laws. Consequently, the Comptroller interpreted the Circuit Court's opinion to mean that ATMs that are not owned or rented by a bank are not branches of that bank for purposes of the Federal banking law. The practical effect of this reading is that if a national bank provides customers access to an ATM network established by other institutions by paying, for instance, transaction fees, such access is not restricted by state branching laws or the Federal prohibition on interstate branching.

Relying on the 1976 IBAA decision, both national and state member banks have been able to participate in the dramatic growth of ATM networks. In 1980, there were relatively few networks. Today, there are at least 200 regional networks, seven of which operate nationwide. Five of the national networks encompass more than 9,000 ATMs and over 5,000 financial institutions. The nine largest regional networks consist of over 7,000 ATMs and 2,700 financial institutions. Put differently, as of 1983, the customers of 7,500 banks were using 16,000 ATMs that were connected to shared networks. These ATMs processed about 60 million transactions a month. Thus, shared ATM networks have become an integral part of the nation's commercial fabric.

The Marine decision has placed all these extensive network arrangements, and the public benefits derived from them, in jeopardy. In that case, the district court held that, by allowing its customers to use an ATM established by a grocery store, Marine Midland Bank was engaged in illegal branching. This decision has already had a chilling effect on the development of new networks. Banks are putting plans for future shared networks on hold until the outcome of the Marine case is clear. If the decision is upheld, not only will the future development of networks be halted, but the existing networks would also become unravelled. Many institutions would stand to lose millions of dollars invested in currently operating shared networks. Finally, and most importantly, the

Marine decision imposes hardships on bank customers who could no longer benefit from the proliferation and convenience of shared ATMs.

Effect of S. 2898 on ATM networks

S. 2898 would reverse the Marine decision and would preserve the status quo under which the banks, the OCC and the Federal Reserve have been operating since 1976. The bill would prevent the dismantling of existing ATM networks and preserve the significant benefits provided by ATMs to consumers, participating financial institutions, and the economy in general.

For the consumers, shared ATM networks mean greater convenience as banks' services are available in a larger geographic area and in more locations. No longer need the customer choose between a financial institution which is located either close to the home or the work place, but can have access to his/her financial institution even in the course of today's hectic and highly mobile life styles.

ATMs also provide greater time convenience to customers. They allow consumers to transact business with banks more quickly, and usually during more convenient and flexible hours as many ATMs offer 24-hour access.

Perhaps the greatest benefit to consumers from shared ATMs is that they result in bank services at lower cost. The large number of network members and the large transaction volume creates economies of scale which, in turn, reduce the cost of financial services to the consumer. It is no wonder that consumers have quickly embraced the benefits of ATMs and demanded more.

ATMs also provide significant benefits to participating banks. The networks allow member banks to serve their customers without investing in expensive brick-and-mortar branches or even in their own ATMs. This is especially important for small banks that often cannot afford the high front-end investment expense. Shared ATM networks also allow participating institutions to benefit from proportionately lower overhead costs as the volume of ATM use increases.

Effect of the proposed CSBS amendment

As you requested, I will also comment on the amendment proposed by the Conference of State Bank Supervisors (CSBS). This amendment would allow states to regulate the location, ownership, operation and permissible functions of ATM networks even when these networks are established by federally chartered institutions. We do not support this amendment, as it represents a step backwards for the bank customers. If enacted, it would encourage more restrictive state regulation of ATMs in the future, a result clearly detrimental to bank customers.

The CSBS version would allow states to prohibit the participation of out-of-state banks in its networks -- for instance, Kansas law already prohibits an out-of-state bank from participating in a network in that state. Second, a number of state laws impose restrictions on the kinds of services that customers may get through shared ATMs. Third, this amendment would allow states to regulate and supervise networks established by federally-chartered institutions. Needless to say, this would lead to red tape, duplicative expenses, and unnecessarily burdensome regulation, the cost of which ultimately will be borne by bank customers.

Finally, we believe the CSBS amendment would result in additional litigation and, therefore, delays in the development of ATM networks, because it states that a shared ATM is only presumed not to be established by a national bank. This presumption would place the entire issue back in the courts. The bill should clarify for the courts the Congressional intent with respect to ATMs, not invite the courts to ascribe motives to this Congressional measure.

Conclusion

In conclusion, both the consumers and the banking industry have benefitted from the advent of the ATM and shared ATM networks. Allowing the *Marine* decision to stand would mean a giant step backward for the American consumer. I urge Congress to preserve the status of existing ATMs and the ability of financial institutions to develop new shared networks by enacting S. 2898.

Senator **Gorton**. Thank you, Mr. Mancusi.
Mr. Malarkey, you may proceed.

STATEMENT OF JOHN E. MALARKEY, STATE BANK COMMISSIONER OF DELAWARE, ON BEHALF OF THE CONFERENCE OF STATE BANK SUPERVISORS

[The complete statement follows:]

Mr. Chairman, members of the Subcommittee, I am John E. Malarkey, State Bank Commissioner for the State of Delaware, Vice President and Chairman of the Federal Legislation Committee of the Conference of State Bank Supervisors, on whose behalf I am testifying today.

The Conference of State Bank Supervisors (CSBS) is the professional organization of state officials who charter, regulate and supervise the approximately 10,500 state-chartered commercial and savings banks of the nation. Created in the early 20th Century as a clearing house for the ideas of the state bank supervisors on common problems, CSBS has evolved into the major champion of our decentralized American banking and bank regulatory structures.

We are pleased to have this opportunity to testify regarding S. 2898 and recent developments in the area of shared automated teller machine networks.

CSBS Policy

The Conference supports the use of unmanned electronic funds transfer systems to deliver better customer services. Toward this end, on October 31, 1980, our Board of Directors adopted a policy of encouraging enactment of state statutes embodying the following:

1. States should encourage the establishment of unmanned electronic funds transfer (EFT) systems within the states by banks or others which, by contract or agreement, will enable customers of local financial institutions to obtain financial services when customers are away from their banks. This procedure will enable individual banks better to serve their customers and retain their customer bases.
2. States should encourage the establishment and operation of such EFT systems subject to reasonable requirements as the state may choose, including the nature and geographic scope of transactions to be offered.

3. States should supervise and examine state-chartered institutions providing EFT services for customers of institutions located elsewhere; and the Comptroller of the Currency or the Federal Home Loan Bank Board should supervise and examine respective federally chartered institutions.

4. Should an amendment to Section 36(c) of the National Bank Act (The McFadden Act) be found necessary to enable national banks to make use of the state statutes proposed herein, the Committee recommends that CSBS either support, or alternatively, agree to the necessary Congressional action.

In essence, we sought to encourage state exceptions to structural constraints, with such conditions, both operational and geographic, as each state saw fit. To the extent that an exception was created, we felt that it should apply to national banks as well as state banks, so long as the conditions of those exceptions applied as well.

Underlying these policies is a belief that a balance must be struck between public interest in the expansion of service provision and public interest in maintaining a competitive market for service needs. It is important to retain a desirable level of competition for service needs by safeguarding the competitive equality of local institutions and by avoiding concentrations of power. This is true even when dealing with shared ATM systems which maximize efficiency from both a bank and bank customer standpoint. High up front costs and large-scale efficiencies in ATM systems renders shared ATM systems both a mechanism to ensure local access and competitive equality and a mechanism susceptible to centralized control by a few large institutions. In the short term, competition for participants will guarantee access for smaller institutions and maximize user access. In the longer term, economies of scale may tend to concentrate and consolidate existing systems and limit entry of new competitors, absent safeguards such as now contemplated in many state statutes. Public interests in ATM location and function closely parallel public interest in bank branching, as embodied in the McFadden Act and the Douglas Amendment to the Bank Holding Company Act.

The Status Quo

The current status of ATM placement, function and regulation is determined by federal statute, Appellate and Supreme Court decisions and state law.

The relevant federal statutes are 12 U.S.C. §§36 and 81. Section 81 requires each national bank to conduct its "general business" at its main office, as stipulated in its organizational certificate, and at its "branch or branches, if any, established or maintained by it in accordance with the provisions of (12 U.S.C. §36)." Section 36(c) provides that a national bank may not "establish and operate new branches" except within the state in which the bank is located, and then only to the extent that state-chartered banks in that state are permitted to establish and operate branches. The term "branches" is defined in Section 36(f) as including "any branch bank, branch office, branch agency, additional office, or any branch place of business. . .at which deposits are received, or checks paid, or money lent."

The Supreme Court and three U.S. Courts of Appeal have pointed out that the scope of the term "branch" is not limited to offices which perform the three functions designated in Section 36(f) but also is intended by Congress to include any place at which a bank transacts "any business carried on at the main office." In one of these cases, Colorado ex rel. State Banking Board v. First National Bank of Fort Collins, the Tenth Circuit Court of Appeals held that a national bank's off-premises customer-bank communications terminal (CBCT) was a "branch" not only because it permitted the bank to receive deposits, one of the activities expressly described in Section 36(f), but also because it permitted the bank's customers to perform other "traditional banking transactions," namely, the withdrawal of funds and the transfer of funds from one account to another. And, in IBAA v. Smith, the U.S. Court of Appeals for the District of Columbia Circuit held that credit card and loan payments made by means of CBCT's were banking transactions within the scope of Section 36(f) even if they could not be considered to be "deposits".

Relying upon the Supreme Court's analysis in Plant City, the Court held that considerations of "competitive equality" between state and federal banks, rather than private contractual relationships between a bank and its customers, determine whether a facility is a "branch". Because banks with CBCT's could provide banking services to their customers away from their offices and thereby obtain a competitive advantage over banks which did not have CBCT's, the Court held that CBCT's were "branches" under Section 36(f).

In essence, by application of the McFadden Act, customer bank communication terminals owned by national banks which accept deposits and disburse funds are branches and are controlled by state law. It is by virtue of the application of the McFadden Act that state law is controlling in the ATM area and any amendment to the McFadden Act disturbs the status quo.

The current system is based on state law and the OCC-developed position that a CBCT used by a national bank's customers is not a branch unless the bank has a possessory or ownership interest in the CBCT and has thereby established the CBCT within the meaning of Section 36(f). States have enacted laws on the ownership, location, operation and permissible functions of ATMs which have made possible the interchange networks. Congress, following the release of the Final Report of the National Commission on Electronic Fund Transfers, chose to address various consumer protection aspects (*e.g.*, liability for unauthorized transfers), but did not choose to overturn state authority or expand the legal rights of the OCC. Thus, the system has been able to provide an incredible level of services to all types of bank customers.

National banks have benefited from the competitive equality inherent in the current system. They participate in extensive shared systems established pursuant to state law. As recently described by the Electronic Funds Transfer Association:

> Today there are as many as 200 shared regional networks of ATMs serving virtually every state and region of the United States. The 16,000 ATMs connected to shared networks process approximately 60,000,000 transactions per month, which is about one-third the total ATM transaction volume. Nearly 65 percent of the financial institutions with ATMs belong to shared ATM networks, and they have collectively issued over 50 million ATM access cards with shared network logos, representing 67 percent of all debit cards issued in the United States. Moreover, membership in shared ATM networks is common among both large and small, state- and nationally-chartered institutions. In fact, a recent survey indicates that almost 40 percent of the institutions that are now planning to begin offering ATM services for the first time plan to do so through membership in shared systems. (footnotes omitted)

All of these systems have enjoyed the blessing of state laws, most of which distinguish between ATMs and other bank facilities. In a recent CSBS survey of state laws, (draft results attached) numerous state statutes were found to control important aspects of

ATM placement, sharing, use and permissible functions within states' respective borders.

That survey found:*

- 23 state statutes cover ATM deployment by national banks as well as state-chartered institutions.
- 37 states require or expressly permit ATM sharing, with 27 states requiring such sharing in all or some cases.
- 8 states of the 42 with statutes explicitly dealing with ATMs declare those ATMs to be "bank branches", 34 state statutes regard ATMs as other than bank branches by explicit statement to the contrary or by creation of special categories, e.g., "Automated Teller Machine Branch Offices", or are silent on the issue.
- Nearly all states with state statutes have a specific list of appropriate ATM functions, which tend to center around service of existing account and debt relationships or activating prearranged lines of credit.

Both this and earlier CSBS surveys of state law and regulation found a high availability of statewide EFT services whether by placement of facilities or by agreements to offer services through shared, existing facilities. In this survey, 31 states provide for statewide offering of EFT services. In an earlier CSBS survey, which included regulatory interpretations of statutes by state supervisors, 36 states specifically allowed access to ATMs by customers of out-of-state banks, under varying circumstances. While these survey results are preliminary, subject to review and possible revision by state regulatory authorities, they give a fairly accurate reading of the status quo under which both state and national banks operate.

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*Survey results are preliminary, subject to review and possible revision by state regulatory authorities.

In April of this year, the United States District Court for the Western District of New York held that bank utilization of an ATM owned by a third party to allow customers to make deposits and withdrawals from bank accounts held with that bank constitutes a "branch" within the meaning of the McFadden Act (Independent Bankers Association of New York State v. Marine Midland Bank). The Court refused to "blindly accept" the position of the Comptroller that an ATM is not a branch if it is not owned or rented by a national bank. It is clear from that decision, that the Court looked at the substance of the bank/third party relationship rather than its form and found that when customers deposited money in their bank accounts through the ATM in question, the bank had received a deposit within the meaning contemplated by the McFadden Act.

The Court was faced with a state law which specifically defined ATMs as branches and it correctly applied state branching laws. This decision, in our opinion, should not dictate the outcome of any similar suit in states which treat ATMs differently than bank branches. Exceptions in state laws for unmanned facilities are exceptions to the branching laws and, therefore, equally applicable to state and national banks.

The problem, however, would remain as to interstate shared ATMs, since interstate branches are forbidden to national banks under the McFadden Act. S. 2851, the Financial Services Competitive Equity Act, passed by the Senate last week, solves this problem. Section 1002, in part, amends the National Bank Act (12 U.S.C. 5155) by adding an additional condition under which a national banking association may retain or establish and operate a branch. It allows a national bank to have a branch in another state from that in which it is located, (its "home state"), if (i) the other state by statute specifically authorizes state banks situated in the bank's home state to establish a branch in the other state, and (ii) the national bank's home state specifically authorizes by statute a home state bank to establish and operate a branch in the other state. CSBS believes that this section would contemplate participation by national banks in interstate shared ATM networks to the same extent allowed to state banks.

We remain unconvinced, therefore, that any further legislative action is required at this time. Clarification that state ATM laws which create a different class of facility for purposes of branching laws apply equally to state and national banks, however, may be helpful.

It is incorrect to say that shared ATMs were not treated as branches prior to the district court decision in the Marine Midland case. ATMs have consistently been treated as branches. The Comptroller, by regulation, sought to distinguish shared ATMs from proprietary ATMs. The Marine Midland case was the first test of an ATM located pursuant to that regulation inconsistent with pertinent state law. The premise underlying the Comptroller's regulation, that shared ATMs could be treated as other than branches of national banks, was rejected. Moreover, it is not true that many ATMs have been placed without regard to branching restrictions and must be treated as illegal branches, since those which we surveyed were in compliance with state ATM laws, which are exceptions to the branching laws equally applicable to state and national banks. Again, Section 1002 of S. 2851 solves the limited problem of participation in interstate shared ATM networks.

S. 2898

S. 2898, as introduced, would preempt all pertinent state law as to national banks, by creating an absolute exception to the McFadden Act for all shared ATM networks. It would allow full interstate banking activities, including deposit-taking, without regard for either restrictions on bank or bank branch location and activities or state ATM laws. It would allow national banks to do anything they pleased wherever they pleased, so long as they do not establish, own or rent that machine. Under its provisions, large institutions could evade all pertinent limitations on their operations through any of several contractual arrangements in which transactional fees were assessed. Electronic banking likely would become little more than a highly centralized franchise operation.

To this end, upon request, CSBS put forward several suggested changes in S. 2898 to maintain current levels of state authority, by letter dated August 10, 1984, addressed to a staff member of Senator Trible. The following changes were suggested:

. at the end of section (i)(1), strike the period and add the following:

> "if such automated device is otherwise established and operated in compliance with all pertinent state laws regarding its location, ownership, operation and permissible functions."

. at the end of subsection (i)(2)(A), strike "or rented by that bank" and insert, in lieu thereof, the following:

> ", rented, or controlled exclusively by that bank."

. in subsection (i)(2)(B), strike "...is not established..." and insert, in lieu thereof, "...is presumed to not be established..."

The first of these amendments would ensure that state laws which currently apply to ATM systems by virtue of being exceptions to state branching laws, would continue to apply even though the shared ATM would no longer continue to be classified as a branch. This would preserve the heart of the status quo and would eliminate the "wide open" ATM environment which would be occasioned by the bill. This is not our preferred way of accomplishing this end. It would be simpler to merely amend the McFadden Act to make clear that state laws specific to ATM location and function are to be treated as exceptions to the McFadden Act applicable to national banks as well as state banks.

The second of these amendments is designed to prevent mere franchising of ATM networks by large BHCs in order to qualify for the exception to the McFadden Act. It would be all too simple for a large money center BHC to market its ATM machines nationwide, with the guarantee of favorable financing and a guaranteed monthly transaction fee which would cover a purchaser's monthly payments. Full service ATMs could be in operation in the corner of every marginal business in a good location in the country, nominally owned by the host business.

The third of these is designed to eliminate an apparent loophole in S. 2898. Specifically, it would make it clear that a BHC cannot avoid the application of the McFadden Act through a sham billing arrangement whereby it is assessed "transactional fees" for use of a machine which it has established. It is important to preserve, in this exercise, the ability of a court to look behind mere contractual arrangements to actual control of the devices in question.

Summary

CSBS does not believe that there is a current, demonstrated need for S. 2898. The Marine Midland case was brought in a state which treated ATMs as branches for all institutions, allowing their statewide placement, subject only to a "home office protection" statute.

CSBS believes that courts should and probably will apply more liberal state ATM provisions to both state and national banks, since they are exceptions to state branching laws. Competitive equality, which was the thrust behind the McFadden Act, can best be maintained by allowing national banks to take advantage of evolving state laws. CSBS would support a legislative clarification of this point, if Congress deems it necessary. However, we believe that current law anticipates developments in state branching laws, including adoption of a state ATM-specific law, and makes them applicable to state ATMs through operation of the McFadden Act. State laws which allow participation in interstate as well as intrastate shared ATM networks should be equally applicable to national banks.

It is axiomatic that "bad cases make bad law." An isolated case, decided under a peculiar New York state law, should not be used to blackmail Congress into "gutting" the safeguards provided by the McFadden Act and Douglas Amendment. If full nationwide deposit-taking is to occur, it should not be by way of a band-aid offered for your approval by the "McFadden Busters".

State	Statute/ Regulations	Statutory Application	Branch?	Share?	Permissible Functions	Location Within State
Alabama	Statute is General; but detailed implementing regulations (9/1/76)	State regulations cover both federal and state banks, S & L's and credit unions. Fees for out-of-state providers. Federal regulators allowed to permit federally chartered financial institutions domiciled in Alabama to follow these regulations	Silent	Sharing permitted, may be required of any institution by Superintendent of Banks	No new deposit account may be opened, but otherwise permits any deposit, withdrawal transfer and any other service not prohibited	Statewide
Arkansas	Statute: Acts 1977, No. 643	Both National and State Banks are covered by the statute	Silent	Non-discriminatory sharing is required with home county banks	Engage in any banking transaction	same county establishment Some home office protection .
California	1982	State and Foreign commercial banks	"Automated Teller Machine Branch Offices"	Yes, sharing permitted	In addition to ATM functions, an ATM Branch Office can include a night depository	Statewide
Colorado	Bank Electronic Funds Act Art. 6.5 of Title 11, C.R.S.	Any state or national bank with its principle office in the state. Bank Board has authority to issue rules & regulations; hear and decide disputes regarding access.	No	Mandatory sharing for banks; permissive sharing for dissimilar institutions	"Banking transactions", deposits, withdrawals, transfers of funds, loan payments, activating a pre-existing credit agreement	Statewide

State	Statute/ Regulations	Statutory Application	Branch?	Share?	Permissible Functions	Location Within State
Connecticut	Chapter 645a Section 36-193a to n	Connecticut State and National banks; Connecticut State and Federal S & L's; state credit unions and federal credit unions with assets of $2 million or more	No, it is a "satellite device"	Mandatory sharing	"Banking transactions", including deposits, withdrawals, payments, advances and transfers	Statewide with revokable home office protection
Delaware	Title 5, §770	State bank	yes	Permissive sharing like/unlike institutions both intra and inter-state	Deposits or withdrawals from previously established accounts; cash advances; loan or other payments made; transfers of funds, and cash received	Statewide
Florida	§658	National and state banks, state and federal S & L's, state & federal credit unions	No	Permitted	Transactions including, but not limited to dispensing of cash	Statewide; out-of-state entry permitted w/o deposit taking in non-proprietary ATM
Georgia	15-203.2	Banks	No, extension of existing parent bank	Permitted	Routine banking transactions	County wide

State	Statute/ Regulations	Statutory Application	Branch?	Share?	Permissible Functions	Location Within State
Hawaii	HRS 403-53	State banks	No	Mandatory	"Where, among other things, deposits are received and money is lent or disbursed"	Statewide
Idaho	Title 26, Chapter 3	Any federally chartered or state-chartered bank, savings and loan or credit union	No	Required sharing	Deposits, check cashing, cash dispensing, loan payments, account information	Statewide
Illinois	Ch 17, §1301-1360	National and state-chartered banks	No	Mandatory	Receive deposits, permit withdrawals, accept payments, respond to inquiries, transfer funds within accounts at the same bank, check verification and pay out cash	Contiguous Counties
Indiana	Senate Enrolled Act #422 (1984)	State banks	No	Permitted	"Routine banking Transactions"	Statewide

State	atute/ Regulations	Statutory Application	Branch?	Share?	Permissibl Functions	Location Within State
Iowa	§527	National and state banks; Federal and state S & L's and credit unions; industrial loan companies	No	Mandatory sharing for similar institutions	Transactions incidental to the conduct of the financial institution and which are otherwise permitted (only deposit-taking is specifically restricted to contiguous counties).	Statewide
Kansas	K.S.A 9-1111	National and state-chartered banks	No	Mandatory sharing	Banking transactions	Statewide
Kentucky	KRS 287.180 & KRS 289.061	State-chartered banks and savings and loan	No	Mandatory in same county, tied to reciprocal treatment	Withdrawal of funds, transfer of funds; utilization of a line of credit; receipt of deposits	Same County
Louisiana						
Maine	Title 9-B	Financial Institutions	No	Mandatory Sharing	Including, but not limited to cash deposits to and withdrawals from his accounts, cash advances, transfers among accounts and to other's accounts	Statewide

State	Statute/ Regulations	Statutory Application	Branch?	Share?	Permissible Functions	Location Within State
Maryland	Art. 11	State banks	No	Not in banking statute, although S & L's permitted to share with banks	Cash withdrawal, cash advances on previously authorized line of credit, deposits of cash, transfer of funds from one account at bank to another.	Statewide
Massachusetts	Ch. 167B	State or national bank, state or federal S & L, state or federal savings bank, co-op bank and state or federal credit union	"Electronic Branch"	Sharing permitted, however, Commissioner may order mandatory sharing.	Deposits, withdrawals, transfers of funds, obtain advances against preauthorized lines of credit, cash checks or pay obligations	Statewide
Michigan	§23-1137 et seq	State and national banks, state and federal S & L's, state and federal credit unions	No	Mandatory	Deposit account transactions	Statewide
Minnesota	§47.61 et seq	National and state bank, federal and state S & L, Federal and state C.U.	No	Mandatory	Disbursements under a preauthorized credit arrangement, withdrawal, deposit of funds, receive cash or checks, pay loans and transfer between accounts	Statewide
Mississippi	§81-5-100	State banks, specifically extended to OCC regarding national bank powers		Not required by statute	Transfer of funds... initiated through an electronic terminal	Placed within or adjacent to corporate limits of municipality or metropolitan area in which bank or branch is located

State	Statute/ Regulations	Statutory Application	Branch?	Share?	Permissible Functions	Location Within State
Missouri						
Montana	§32-6-101	National and state bank, federal and state S & L's, federal and state C.U.		Mandatory	Debiting or crediting a depositors account	Up to 3 miles outside of the municipality in which the financial institution is located
Nebraska	§8-157	State and National Banks	No	Mandatory	"All banking transactions"	Statewide
Nevada						
New Hampshire	RSA 384-B	State banks, cooperative banks	No	Mandatory for state-chartered institutions	Placing transferring withdrawing funds from already existing accounts, receiving payments and related services	Statewide
New Jersey	Sec. 17-9A	State banks, savings banks	Yes	Permitted, may be required by Commissioner in some cases	Any business which may be transacted at a main office	Statewide

State	Statute/ Regulations	Statutory Application	Branch?	Share?	Permissible Functions	Location Within State
New Mexico	58-16-1 to 17	State and national banks, state and federal C. U. and S & L's	Yes	Permitted	Dispense cash and perform "any normal financial transaction"	Same county
New York	Chapter 764 of the laws of 1975 or sect. 105-a, 240-a and 396-a	State banks, S & L's and Savings Banks	Yes	Permitted	"Deposit-With-drawal activities"	Statewide, but subje to home office prote tion. Provision is made in the regulati of the N.Y. Dept. for reporting "the distance from the nearest authorized, manned banking offic of another commercia bank not sharing the facility." (Thi detail included in this survey due to th recent count case.)
North Carolina	§ 53 General Statutes of North Carolina; Order number 25	State banks and savings and loans	No	Permitted	Withdraw money from account or previously authorized line of credit; receive or transfer funds	Within 50 miles of banks main office or closest branch, unless the machine is shared

State	Statute/ Regulations	Statutory Application	Branch?	Share?	Permissible Functions	Location Within State
North Dakota	Section 6-03-02	State banks	No	Mandatory	To the same extent as national banks	Statewide
Ohio	§1111.03	State banks	Yes	Silent	Withdrawal of funds from or deposit of funds into an account or transfer of funds to or from an account	Any county in which the bark has a manned branch
Oklahoma	6§422	Any bank located in the state	No	Mandatory among banks permitted between banks, S & L's and credit unions	Functions which could legally be performed by banks at the bank's principal office	Statewide
Oregon	ORS 714.200 to 714.992	State and national commercial banks, trust companies and savings banks	Yes	Mandatory	Withdraw money from an account or previously authorized line of credit; receive or transfer funds for the customer's benefit; provide information concerning bank customer's accounts	Statewide

State	Statute/ Regulations	Statutory Application	Branch?	Share?	Permissible Functions	Location Within State
Pennsylvania						
Rhode Island	19-29-1	State Chartered institutions	No	Permitted	To the same extent as federally chartered institutions	Statewide
South Carolina	Title 34 (by interpretation)	State Banks	Yes	No statutory requirement	Branch Functions	Statewide
South Dakota	Chapter 51-20A	State Banks	No	Mandatory for similar institutions; not required for dissimilar institutions	Information relating to banking services	Statewide
Tennessee	Ch. 45-2-xxx	State Banks and State savings and Loans	Yes	Statute Silent	Deposits to and withdrawals from, and transfers between, existing accounts	Statewide
Texas	Art. 342-903a	State, national or private bank	No	Mandatory	Cash withdrawal; access line of credit; deposit funds; transfer funds; make payment; or request customer information	Same County

State	Statute/ Regulations	Statutory Application	Branch?	Share?	Permissible Functions	Location Within State
Utah	7-16-1 to 7-16-18	National and state banks, federal and state S & L's and credit unions, industrial loan corps, consumer finance cos.	No, "special"	Mandatory	Cash withdrawal, deposits disbursements, loan payments and similar transactions	Anywhere in the state, except some home office protection counties of less than 100,000
Vermont						
Virginia	§6.1-39	State banks		Permitted	Deposits accepted, checks paid withdrawals are permitted or recorded	Same as branches (statewide)
Washington	Ch. 30.43 RCW	National and state banks, mutual savings banks; federal and state S & L's and credit unions	No	Mandatory for banks; permitted for banks, and m.s.b's, s & l's and c.u.s	Account transfers, payments, and instruction for deposits and withdrawals	Statewide
West Virginia	31A-8-12	Banks	No	Mandatory	Financial Transactions	Statewide
Wisconsin	Section 221	National or state banks, saving and loan associations, credit unions, and mutual savings banks	No	Mandatory for all financial institutions	Transactions incidental to the conduct of banking	Statewide
Wyoming						

STATUS OF ATM'S

Senator GORTON. Mr. Mancusi, S. 2898 provides that a shared ATM shall not be considered a branch if it is not owned or rented by a bank.

In your view, is there an underlying policy rationale for distinguishing between proprietary and shared ATM's? That is to say, is the provision of a banking service contingent on who owns the machine, why not simply legislate that all ATM's are not branches?

Mr. MANCUSI. Senator, if you go back to the time prior to the 1976 court decision *IBAA* v. *Smith,* the Comptroller's Office did take the view that an ATM, CBCT, or any other acronym used to describe an unmanned teller machine, was not a branch for the purposes of our branching and chartering policies, statutes, and so forth. The opinion of the Comptroller's Office was overturned in that decision and ATM's owned or established by national banks were subsequently treated as branches.

This is more my personal opinion than speaking for the Comptroller since we have not recently taken a public position in this area, but I certainly think the Comptroller's Office would support any legislation or discussion to the effect that an ATM would be viewed as something other than a branch.

Senator GORTON. In other words, at least speaking for yourself personally, there is no policy distinction based on ATM's?

Mr. MANCUSI. That is correct.

Senator GORTON. Would you seek to get the official views of the Comptroller on that subject and communicate them to us?

Mr. MANCUSI. Yes, sir. I would be glad to.

[Response to written question follows:]

Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

October 1, 1984

Dear Chairman Garn:

This is in response to your letter of September 24, 1984, in which you submitted an additional question for the record of the recent hearing on S. 2898 -- The Banking Convenience Act of 1984. You inquired about the OCC's official position on whether there is any policy reason for distinguishing proprietary ATMs from nonproprietary ATMs. You also asked if the Comptroller's Office would like to see all ATMs exempted from the coverage of the McFadden Act.

The OCC has long believed that there is no reason to treat an unmanned automatic teller machine (ATM) as a branch of a national bank for the purposes of the McFadden Act. ATMs do not have the physical, personnel and operational qualities which are characteristic of brick-and-mortar branches. Rather, ATMs resemble more closely the kinds of off-premises contacts between banks and their customers that are not generally considered a form of branching, such as banking by mail or telephone, credit card services, and various correspondent services. ATMs are nothing more than electronic devices for initiating rapid and convenient communications and fund transfers by bank customers.

Based on this reasoning, in 1974, the Comptroller's Office issued an interpretive ruling that stated that unmanned ATMs would not be regarded as branches under the McFadden Act. However, in a 1976 opinion, the Court of Appeals for the District of Columbia overturned the Comptroller's ruling in IBAA v. Smith. Instead, the Court ruled that the branching status of an ATM would depend on its proprietary/nonproprietary character. Because of the IBAA decision, the OCC has subsequently adopted a position that a proprietary ATM -- that is, an ATM that is owned or rented by a national bank -- is a branch of that bank. But, although we are constrained by the IBAA decision, we continue to believe that it would be good public policy to exempt all ATMs from the coverage of the McFadden Act. Both consumers and the banking system as a whole would stand to benefit from such belated recognition of the advanced communications technology.

Nevertheless, let me reiterate again our support for S. 2898 which is at least a good starting point in that it maintains the status quo and reverses the harmful effect of the recent Marine Midland decision. If left standing, that decision would not only perpetuate the current restrictions on ATM use, but would also turn the clock back in a manner which would require dismantling of the existing ATM networks.

Thank you again for providing us the opportunity to testify on S. 2898. If we can be of any assistance in the future, please do not hesitate to let me know.

Sincerely,

Michael A. Mancusi

Michael A. Mancusi
Acting Comptroller of the Currency

The Honorable
Jake Garn, Chairman
Committee on Banking, Housing
 and Urban Affairs
U.S. Senate
Washington, D.C. 20510

Senator GORTON. In the State of Washington, there is a single network which consists of two types of ATM's. Some machines are owned outright by individual member banks, but with the service provided to others through a transaction fee. Other machines in the same network are owned by the network itself, which is in turn owned by a consortium of 50 banks.

Before the recent New York decision, would you have treated the two kinds of machines differently, despite the fact that they are functionally identical and belong to the same system?

Mr. MANCUSI. No, sir. We would treat them the same.

Senator GORTON. In your testimony you discuss the number of regional networks and the number of ATM's owned by regional networks which are jeopardized by the *Marine Midland* decision. Do you know how many regional networks and how many ATM's owned by regional networks are located in the second circuit and would therefore be the most directly affected by that decision?

Mr. MANCUSI. I believe the number is 10 networks and there's approximately 350 to 360 institutions that are affected by that decision. These networks own nearly 8,000 ATM's.

Senator GORTON. Thank you.

Mr. Malarkey, your statement indicates your view that no new law is needed now. Is the reason for that conclusion because you believe that the current situation doesn't threaten national ATM networks or is it because the current situation does threaten those national networks and you think that that threat is a good thing?

Mr. MALARKEY. By the current situation, Mr. Chairman, are you talking about the court decision?

Senator GORTON. Pre the latest decision, pre the *Marine Midland* decision.

Mr. MALARKEY. I would think it's been working very well, sir, and that's why we must leave it. The networks couldn't have developed if the current State laws would have been a detriment.

Senator GORTON. So you think *Marine Midland* does not threaten the system even if it's affirmed?

Mr. MALARKEY. I think you have to take a look at any court decision, Mr. Chairman. I assume it's going to be appealed, and watch the judicial process very carefully, but the system prior to the decision worked very well.

Senator GORTON. You were satisfied with the situation prior to the *Marine Midland* decision?

Mr. MALARKEY. Yes.

Senator GORTON. Thank you. On page 10 of your statement, you made the following statement and I'm going to quote:

> It would be all too simple for a large money center BHC to market its ATM's nationwide, with the guarantee of favorable financing and a guaranteed monthly transaction fee which would cover a purchaser's monthly payments. Full service ATM's could be in operation in the corner of every marginal business in a good location in the country * * *

Now I suppose there are a substantial number of people, most particularly consumers, who think this would be a great idea, a good idea. I gather you feel that it's a bad idea. Why?

COULD CIRCUMVENT STATE LAWS WITH ATM'S

Mr. **Malarkey**. I think we're talking about a contractual arrangement here whereby a large money center bank—we all know who they are—could place ATM's anywhere in the country for a franchising operation, contract the service, and override any State's law regardless of what it is.

Senator **Gorton**. Well, you think this is a bad idea simply because of what you would like to have as the primacy of the State law or as you think it would be a bad idea because it's bad for customers and consumers?

Mr. **Malarkey**. Well, preemption is what we are talking about basically here, and as you know, some States have tougher consumer protection laws than Federal law. If you preempt State laws completely, then those States which have more restrictive consumer protection laws than the Federal law are going to be gone. So in some States you're going to be hurting the consumer.

Senator **Gorton**. Unless the State changed its law.

Mr. **Malarkey**. Unless the State changed its law.

Senator **Gorton**. Let's take the opposite sort of a mirror image of that one. Under current law, doesn't it appear that State banks at least in some States will have a significant advantage over national banks with regard to participation in shared ATM's because national banks would be bound by the branch definition, assuming *Marine Midland* is correct, while State banks may very well have much more congenial regulatory environments?

Mr. **Malarkey**. I don't know how they work it in any other State, Senator, other than my own, so I'm going to go back on that. They would be treated the same in Delaware.

Senator **Gorton**. They would be treated the same in Delaware?

Mr. **Malarkey**. Absolutely the same. In fact, our statute only covers State-chartered banks.

Senator **Gorton**. Because you are here for the Conference of State Bank Supervisors, would you be able to supply us with information as to how many States that equal treatment would apply as it does in Delaware and how many national banks might well be penalized?

Mr. **Malarkey**. I certainly can, Senator.

[Response of Mr. Malarkey appears on p. 219.]

Senator **Gorton**. Thank you. In your testimony you state in quoting your CSBS survey that nearly all States with State statutes have a specific list of appropriate ATM functions. Speaking generally, do these statutes purport to limit the activities of proprietary or shared ATM's of national banks? Do they deal usually with national banks?

Mr. **Malarkey**. Some State statutes do. Some others do not. Mine do not mention national banks.

Senator **Gorton**. What's the legal basis for their attempt to control the activities of national banks?

Mr. **Malarkey**. I would assume—and I'm not really up to par on what other States are doing with their statutes, Senator, I just assume they feel that's right. We don't in Delaware. We do require national banks to submit certain reports. We require them to have the same record retention schedule that State banks do. When we went to the ATM part, we dealt only with the State-chartered banks. However, I will add that one of the testimonies I read dealt with someone putting ATM's in 7-Eleven's The National bank in Delaware has an ATM in every 7-Eleven in the State and they came and asked me if I had any problems with it before they did it.

Senator GORTON. I gather you replied you did not?

Mr. MALARKEY. I did not have any problem.

Senator GORTON. Senator Hecht.

Senator HECHT. No questions.

Senator GORTON. Senator Trible.

Senator TRIBLE. Just a couple questions, Mr. Chairman.

BENEFITS TO CONSUMERS FROM ATM'S

Mr. Mancusi, you have enumerated for us this morning some of the benefits that flow to consumers as a result of ATM networks. Can you enumerate some of the benefits that flow to the banking community? Oftentimes people think only in terms of the big banks, but there are a lot of smaller and midsized banks that participate as well.

Mr. MANCUSI. When you look at the smaller banks and the cost associated with their ability to expand, whether it's within their States or in any other way to provide basic customer services in a wider geographic area, it is very expensive for small banks. Through being able to participate in shared networks, that cost is reduced substantially for the smaller banks. There is less startup cost. A sharing agreement means less of an initial dollars investment, as compared to establishing a brick and mortar branch to a ATM network. Sharing permits them to extend services to their customers in a wider geographic area at a minimal cost.

Senator TRIBLE. Let me pursue a point broached by my colleague from Washington. There's much ado made today in some of the testimony opposing this initiative about keeping the two parallel systems viable and equitable.

If the *Marine Midland* decision is sustained, what impact would that have on the ability of national banks to compete with State banks that will be able to participate in these shared networks?

Mr. MANCUSI. Well, I don't know the exact number, Senator, but if the decision is sustained, a number of those systems will have to be unraveled. National banks may not be permitted to participate or share in those networks. There will be a substantial loss because their initial investment is forfeited. Assuming it would be legally permissible for them to share in a more narrow geographic area, it's going to require them to go through a more costly and time consuming process of branch applications. The cost associated with branch applications, and the time limits for processing those branch applications will not benefit the industry or its customers.

Senator TRIBLE. Beyond the attendant costs, they would obviously be at a competitive disadvantage.

Mr. MANCUSI. That's correct.

Senator TRIBLE. In terms of the ability of State banks to continue to participate in these networks.

Mr. MANCUSI. Yes, sir.

Senator **Trible**. The purpose of this legislation is to restate the status quo and to ensure that the situation that attained prior to *Marine Midland* continues to apply and permit the establishment of these networks.

Is it your judgment and that of the Comptroller of the Currency that that is indeed the effect of this legislation?

Mr. **Mancusi**. Yes, sir. That's absolutely correct.

Senator **Trible**. Mr. Malarkey, you have raised the spectre of Federal preemption of State authority and as a Virginian I must tell you that I'm always very sensitive to State's rights and the prerogatives of the Old Dominion and the other States that came into being long after Virginia. Delaware, of course, was right there at the very beginning. But it seems to me here that all this legislation does is preempt State authority in terms of the classification of ATM's as branches. I don't see how this legislation in any way affects State authority over such things as location, ownership, operations, services to be rendered by shared ATM's.

Am I misreading my bill or perhaps are you overstating the preemption?

Mr. **Malarkey**. I don't feel, Senator, that I am overstating the preemption. I think one of the things that's been made clear here was the variety of the State statutes. They are not all the same. There is no question that this bill would definitely override some State statutes.

As a matter of fact, it's not going to do anything in Delaware because ours doesn't apply to national banks even though they may conform to it, but we don't get into the national bank action in our ATM's which you're definitely going to do in some States, and I think our survey that was appended to the formal testimony would show which States are going to do it.

Senator **Trible**. Well, it would seem to me that the only area where you have a potential conflict between the Federal and State governments here is in the area of the classification of ATM's as branches and that this legislation in no way interferes with the prerogative and powers of States to regulate the marketplace and determine how those ATM's will function and what kinds of services will be provided. So I think your concerns are reasonable and I think that we should be sensitive to the proper role of the Federal and State governments at all times, but I really think your concerns are too broadly stated. But the point is made and we will be sensitive to that concern of the important constituency that you represent.

Mr. Chairman, I suspect that I will yield at this time and if I have further questions perhaps generated by the other testimony today we can submit questions for the record.

Senator **Gorton**. Yes. Both the members present and those not present and staff may very well have additional questions which we will submit to you in writing.

[Response to written questions appear on p. 219.]

We would like to thank both of you for your help to the committee in this connection.

Our second panel will include Mr. Brandel, partner, Morrison & Foerster of San Francisco; Mr. Hamlin, president of IBAA of New York; Mr. Dale Browning, Colorado National Bank of Denver; Mrs.

Mary-Pat Cotrell, of the Citytrust of Bridgeport, CT; and Mr. Elliott of MasterCard International, Inc.

We thank each of you for joining us here today. I will repeat the admonition I gave to the first group. I would appreciate your summarizing your testimony if at all possible. We will hear your formal statements first and then I think question you as a panel.

Mr. Brandel, you may proceed.

STATEMENT OF ROLAND E. BRANDEL, ESQ., PARTNER, MORRISON & FOERSTER, SAN FRANCISCO, CA, MEMBER OF THE CONSUMER BANKERS ASSOCIATION LAWYERS COMMITTEE, CONSUMER BANKERS ASSOCIATION

Mr. **Brandel**. Thank you, Senator.

I am Roland Brandel of the San Francisco law firm of Morrison & Foerster, appearing today on behalf of the Consumer Bankers Association [CBA]. I serve as a member of the CBA's Lawyers Committee. I'm a past chairman of the American Bar Association's Committee on Consumer Financial Services, and still serve as chairman of its subcommittee on electronic fund transfers and coauthored a treatise on "The Law of Electronic Fund Transfer."

CBA has submitted an extensive statement for the record which I will only highlight this morning.

CBA MEMBERS ARE CONCERNED FOR NATIONWIDE NETWORKS

The Consumers Bankers Association represents the depository institutions that supply the bulk of the Nation's consumer credit and deposit services. Our interest in the pending bill arises from the fact that our member institutions participate in virtually all of the national and regional ATM networks now operating in the United States. CBA members are very concerned that without this bill they and their customers may be denied the ability to participate in and use the many regional and nationwide ATM networks that have grown and thrived over the past decade.

The problem, as you know from testimony already this morning, is a lower court holding in the *Marine Midland* case that a Federal banking law enacted nearly 60 years ago should be interpreted to characterize ATM's in a shared network as branches of the national bank participants in those networks. As branches, these ATM's would be subjected to the restricted State and Federal policies on branch locations. This follows, said the court, even though such devices are owned and operated by nonbanks and even though forced withdrawal of national banks from shared ATM systems could decimate one of the most successful and useful forms of banking services now available to the public.

CBA wholeheartedly supports the efforts initiated by Senators Trible and Humphrey in introducing S. 2898 as a critically necessary, narrowly focused way of removing the ominous cloud that now hangs over all shared ATM networks.

I will not dwell on the sheer numbers of systems, financial institutions or consumers whose interests are in jeopardy under the court holding, nor on the hundreds of millions of dollars of bank investment in system development that may be at risk. The numbers are contained in our statement. They demonstrate a simple fact, however. Shared ATM networks permit thousands of banks to offer types and ranges of banking services that millions of customers want and are using today.

I would, instead, like to stress some aspects of the bill that make a compelling case for its passage.

The issue in the *Marine Midland* case and in S. 2898 is one of broad national import and is not limited to parties to, or the facts, in that case. Shared ATM networks offer enormous efficiencies and convenience both to the participating institutions and their customers.

The essence of the network is an electronic communications linkup of numerous ATM's scattered geographically, owned by certain institutions but shared by many others. In the *Marine Midland* case, for example, the actual hardware was owned and serviced by the Wegman's Grocery Chain, but through a communications switching system several different financial insitutions could use the Wegman ATM for deposits, withdrawals, and related services.

Adverse court decisions—or even ones that appear imminent—could cause every shared system that includes national banks, including, for example, MasterTeller, to begin to unravel. The national and State member banks that sustain those systems would be legally barred from sharing ATM's, both local or regional systems, like Harmoney, any national networks, like Plus, because such participation would involve illicit branch banking. Now, that will not be true for all intrastate systems, as Mr. Malarkey's testimony indicated. It would certainly be true for the national networks.

The stakes, Mr. Chairman, are no less than the future of electronic payments services nationwide. This bill therefore addresses a public policy issue of the highest order. The issue is not the narrow self-interest of a few litigants, nor does the bill pit banks against their customers, for bank customers have shown by their overwhelming acceptance that they want shared systems. They want ATM access because of the convenience it offers and the immense economic savings our society will enjoy as it moves into the era of electronic banking.

The bill is a narrow surgical response to the problem created by the *Marine Midland* case. The chairman put his finger on that issue when he asked Mr. Malarkey whether the law prior to the *Marine Midland* case was satisfactory and the answer was yes.

BILL WOULD RESTORE STATUS QUO

It is our position that this bill simply restores the status quo that had been the law at least since 1976 when the courts and the Comptroller of the Currency indicated that an ATM was a branch bank only if the bank owned or rented the device. The Comptroller's interpretations since 1976 have consistently affirmed that bona fide shared ATM's were not branches. The owned or rented test is a reasonable dividing line and countless national banks have relied on those Comptroller's interpretations to invest tens of millions of dollars in systems development, deployment, and marketing. Customers of existing shared systems have also come to rely on the broad financial services the systems provide.

Congress must not permit, by default, a lower court to change the basic rules on what constitutes a branch on tenuous legal grounds. Even the trial court in the *Marine Midland* case expressed concern as to whether the judiciary could adequately resolve the issue before it. There is too much at stake for our society for Congress to shift to the judiciary the task of developing a national policy on ATM sharing through a uniform judicial interpretation of the McFadden Act. Such a uniform policy can only be promulgated judicially by the U.S. Supreme Court and that will occur most likely only after a significant period of costly and development-stifling uncertainty.

The other choice, of course, is for Congress to clarify what Congress' policy is. A proper and judicious legislative response would be to do exactly what S. 2898 proposes, clarify that the Federal statutory definition of a branch excludes ATM's that are neither owned nor rented as a proprietary device by national or State member banks. We believe that S. 2898 does just this, nothing more, in the form in which it was introduced and ought not to be further complicated with amendments.

The bill is not and ought not to be the vehicle for substantive changes in the dual banking system. I think that is the fear of Mr. Malarkey. There are suggestions that this bill ought to strengthen State regulatory powers over national bank branching or that it somehow by insinuation authorizes nationwide deposit taking through ATM's or that Congress should use this occasion to address proprietary ATM systems as well as shared systems.

We disagree with all of those positions. The bill should be left to do exactly what we understand its sponsors intend to do, cure the *Marine Midland* problem and that only.

Finally, we are aware of some of the views of others on this panel and we hope that their questions will illuminate some of the differences in positions we have taken. I would like to offer a general observation now, however. Congress should not overrespond to facts-specific arguments that are based on the position of a single litigant which enjoys certain protective State legislation. Congress legislates for the Nation and the Canandaigua story is scarcely typical. No small bank is shielded by protective legislation in my State, in California, for instance, yet small banks there and elsewhere thrive in a truly competitive marketplace and consumers are the beneficiaries of that competition.

Further, Canandaigua and other banks like it may be protected temporarily if they are successful in advocating their position, but that protection will only be partial. They may hobble the entire banking industry with competitive restrictions, but other nonbank entities without similar restrictions will position themselves to occupy the marketplace. Meanwhile, consumers and banks, large and small, that have invested to bring services to consumers, will be the losers.

Mr. Chairman, the Consumer Bankers Association would welcome a forum to address a number of matters that affect the competitive equality of our members. Even before the *Marine Midland* decision there were debatable questions on, for example, the extent to which State law could affect national bank operations. But this is neither the time nor the place for a larger adjustment to the banking laws. What is critical is that the narrow issue of the definition of a branch be clarified so as not to dismantle the several hundred shared ATM systems now operating.

Mr. Chairman, CBA appreciates your interest in this important issue, offers its enthusiastic support for S. 2898, and urges its prompt enactment.

[The complete statement follows:]

TESTIMONY OF
THE CONSUMER BANKERS ASSOCIATION
BEFORE THE
COMMITTEE ON BANKING, HOUSING
AND URBAN AFFAIRS
UNITED STATES SENATE

ON

THE BANKING CONVENIENCE ACT OF 1984
S.2898

Mr. Chairman:

I am Roland E. Brandel, partner in the firm of Morrison & Foerster, San Francisco, California. I am a member of the CBA Lawyers Committee and co-author of the book The Law of Electronic Fund Transfer. I am appearing on behalf of the Consumer Bankers Association (CBA),(1) The CBA unequivocally supports S.2898, "The Banking Convenience Act of 1984," without further amendments, and commends you for holding these expeditious hearings on the critical consumer issue addressed by the legislation. S.2898, in large part, codifies the Office of the Comptroller of the Currency's regulation that permits national banks to "share" automated teller machines (ATMs) and similar electronic fund transfer devices so that

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1. The Association is a nonprofit organization that was organized in 1919 to provide a voice for the retail banking industry. Today, membership in the Association is open to any federally insured depository institution, including commercial banks, thrifts, credit unions, and other providers of consumer financial services. Associate members include bank card processors and service provider organizations. Combined, the members of the Association now hold over 70% of all consumer credit outstanding held by commercial banks and over 80% of the consumer deposit accounts held by commercial banks.

consumers may continue to access their accounts through electronic terminals established by institutions other than their own on a regional and national basis.

The bill would exclude certain shared ATMs and similar electronic devices from the definition of a "branch" under the McFadden Act (12 U.S.C. 36). It would permit the continued operation and development of shared electronic systems under the same laws and regulations that fostered their growth before the systems were threatened by a recent judicial determination.

CBA's interest in S.2898 arises from the fact that our member institutions participate in virtually all of the national and regional shared ATM networks now operating in the United States.

ATM DEVELOPMENT

The need for this legislation can only be appreciated with an understanding of the growth of electronic banking services. A decade or so ago consumers were often limited to transacting their banking business at fixed bank locations during regular and often limited banking hours. There were relatively few means for consumers to access their bank accounts at off-hours, while at work, or at any distance from home, except perhaps through checks and bank credit cards. Vacationers were often forced to carry large sums of money or traveler's checks to ensure that their cash needs could be met. On extended trips, consumers had to make complicated arrangements to ensure that their bills at home were paid. The development of automated access systems has changed the delivery of financial services and now enables consumers to transact their banking business much more conveniently.

The automated teller machine (ATM) is the most widely known and used electronic device. ATMs permit a customer of a financial institution to communicate with that depository or credit granting institution for the purpose of performing one or more types of financial transactions, including withdrawals from asset accounts, transfers between accounts, balance inquiries, deposits and cash advances on established lines of credit.

The first ATM appeared in the United States in 1969, and approximately 2,900 ATMs were operating by the end of 1974; this number quadrupled to 12,000 ATMs by 1979; and tripled again, to 38,600 operational ATMs by the end of 1983; 46,300 ATMs are projected to be in use as of June, 1984. Not only has the number of these devices multiplied, but so has the use of each machine. Where a 1979 survey reported that the average ATM monthly transaction volume, excluding balance inquiries, was approximately 3,500 transactions, a more recent survey showed an average volume of 4,730 transactions per month. It has been estimated that there were 2.2 billion ATM transactions in the United States during 1983; those transactions included cash withdrawals in excess of $150 billion. These figures evidence the growing volume of ATM transactions, especially during the last five years. They also underscore the public acceptance of, and reliance upon, the convenient services that ATMs and shared ATM networks provide.

SHARED ATM SYSTEMS

The past five years also have witnessed an unprecedented growth in shared ATM arrangements. This is not surprising, since such shared systems provide the most economical and efficient means for both small and large institutions to provide a broad array of consumer financial services. By the end of 1983, more than one hundred shared ATM networks were in existence, of which seven are nationwide.(2) Approximately fifty-five percent (55%) of the ATMs in use at the end of 1983 belonged to shared ATM networks.

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2. The seven nationwide shared systems are: Plus Systems, Inc., Cirrus Systems, Inc., Nationet, Inc., MasterTeller, The Exchange, VISA.

A shared ATM arrangement, commonly referred to as a shared network, interchange, or system allows a number of institutions to conduct transactions with their customers through a common network of ATMs and communication link-ups. As a result, the customers of all of the participating institutions may access their accounts by using ATMs owned or leased by other institutions. It is now possible for a vacationer or business traveler with accounts in a Texas institution to withdraw cash from an asset account or obtain a credit card advance while in California, through an ATM maintained by a California institution that participates in the same "shared" network as the customer's home institution.

Shared ATM networks have proved particularly valuable to people living in metropolitan areas that cross state lines. For example, an individual who lives in Maryland or Virginia, works in the District of Columbia, and regularly travels and shops around the local area, now has access to his or her savings and checking accounts while at work, at home, or at play, through the use of shared ATM networks. Consumers also find these systems safer than carrying large amounts of cash. The volume of ATM transactions made nationwide demonstrates that consumers desire the convenience, cost savings, security and efficiency of such services.

The shared ATM network, like the ATM itself, represents a quantum leap in the ability of institutions to satisfy customer needs.

NATIONAL BANKS AND SHARED NETWORKS

Widespread national bank involvement with ATMs and shared ATM networks has been based, in significant part, on interpretive rulings and a regulation of the Comptroller of the Currency concerning the application of the McFadden Act's branching restrictions. In November 1976, the Comptroller issued an interpretive ruling that specified when an ATM would be considered a "branch" under the McFadden Act. This ruling closely reflected the D.C. Circuit's decision in *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921 (D.C. Cir.), cert. denied sub nom., *Bloom v. Independent Bankers Ass'n of America*, 429 U.S. 862 (1976) (*Smith*), and provided that any ATM "which is not established by a national bank (i.e., owned or rented by the bank) is not a branch of a national bank and not subject to the provisions of the McFadden Act."

On the basis of the 1976 interpretive ruling, the Comptroller's legal staff issued a series of letters in the late 1970s and early 1980s which concluded that reciprocal arrangements do not constitute branch banking when institutions allow their customers to make withdrawals and deposits at ATMs owned and operated by other participating depository institutions. In 1980, the Comptroller's Chief Counsel confirmed that national banks could participate in shared ATM networks which operated across state lines, so long as the requirements set forth in the Smith decision were satisfied.

Finally in July 1981, the Comptroller published a proposed regulation codifying the 1976 ruling that an ATM is not a branch of a national bank if the bank does not own or rent the ATM. 46 Fed. Reg. 38,925 (July 30, 1981). Following public comment, the proposed regulation was adopted and became effective on August 9, 1982. 47 Fed. Reg. 29,823 (July 9, 1982). The regulation is presently codified at 12 C.F.R. § 5.31(b) (1984) and defines a customer-bank communication terminal branch ("CBCT branch") as:

> . . . an automated device, established (i.e., owned or rented) by a national bank at a location separate from the main office of a domestic branch, that:
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> (1) Takes deposits, or
> (2) Disburses cash drawn against:
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> (i) A customer's deposit account, or
> (ii) A customer's preapproved loan account.

Consequently a national bank's CBCT, of which an ATM is one example, is not a branch, so long as it is not owned or rented by that bank. In reliance on the *Smith* decision and the Comptroller's ruling and interpretive letters, national banks and others have invested more than one billion dollars to participate in shared ATM networks which they had every reason to believe were lawful under the McFadden Act.

THE MARINE MIDLAND CASE

This regulatory framework for shared ATMs, in place for nearly eight years, was recently challenged in the United States District Court for the Western District of New York. On April 6, 1984, in *Independent Bankers Association of New York State, Inc. v. Marine Midland Bank N.A.*, (*IBANYS v. Marine*), the court cast doubt on the reliability of the Comptroller's interpretation of the McFadden Act. The court held that a shared ATM that was owned by a supermarket but used by the customers of Marine Midland, N.A. (a national bank) was a *branch* of the national bank under the McFadden Act.

The language of that decision is broad enough to be interpreted to mean that any ATM, regardless of who owns it and what functions it performs will be considered a branch of any national bank whose customers share its use.(3) As the McFadden Act prohibits national bank interstate branching, the decision jeopardizes the viability of regional and national interchange systems because ultimately, customers of national banks may not continue to access their accounts from ATMs outside their institution's home state.

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3. Under the Court holding, if the device takes deposits or cashes checks (draws down an asset account) or makes a loan (draws down an open line of credit), the facility is a national bank branch. (See 12 U.S.C. 36(f)).

The decision similarly restricts the participation of state member banks of the Federal Reserve System because 12 U.S.C §321,(4) as interpreted in Regulation H, requires that branches of member banks must be established on the same terms and conditions as are applicable to branches of national banks under the McFadden Act. Furthermore, in states where branching laws restrict branching of all in-state institutions, the ability of national banks to join intra-state networks would be impeded. For example, in a state where branching is restricted on a county-wide basis, a national bank's participation in an intrastate system would be limited to those counties in which a parent bank or a brick-and-mortar branch is located.

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4. One of the primary reasons for the passage of the McFadden Act was to encourage membership in the newly created Federal Reserve System. With state banks being able to branch and national banks prohibited from branching, there was an incentive to leave the system. State member banks were also covered by the branching rule to assure that they would not be discriminated against. Therefore, most legal commentators believe that the branching restrictions which apply to national banks are equally applicable to state member banks pursuant to the "proviso" clause in 12 U.S.C. 321:

> *Provided*, *however*, That nothing herein contained shall prevent and State member bank from establishing and operating branches in the United States or any dependency or insular possession thereof or in any foreign country, on the same terms and conditions and subject to the same limitations and restrictions as are applicable to the establishment of branches by *national banks* except that the approval of the Board of Governors of the Federal Reserve System, instead of the Comptroller of the Currency, shall be obtained before any State member bank may hereafter establish any branch and before and State bank hereafter admitted to membership may retain any branch established after February 25, 1927, beyond the limits of the city, town, or village in which the parent bank is situated. (Emphasis added)

In fact, because it looks to the functions performed at a facility, the decision would arguably include as a branch any retail outlet that honored a bank credit or debit card or cashed customer checks pursuant to a check-guaranty card.

THE SYSTEM INVOLVED IN MARINE MIDLAND

Because of the complex nature of these shared systems, I would like to explain further the shared network involved in the New York decision. In the summer of 1983, Wegman's installed an ATM in its Canandaigua, New York supermarket. Shortly thereafter, Wegman's entered into a contract with Marine Midland Bank, N.A., to tie the Canandaigua Wegman's ATM into the HarMoney network.(5) Customers of a HarMoney member institution (of which Marine is one) may, by inserting into the ATM an identification card issued by a member bank contact their financial institution for the purpose of making deposits, withdrawals, balance inquiries or obtaining a cash advance on an established line of credit. Marine Midland Bank, N.A., operates the "switch"(6) which connects the network. Nine other

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5. A shared ATM network, such as the HarMoney network which is the subject of this case, is one which permits customers of more than one financial institution to use ATMs that are part of the network.

6. "Switch" is the term used to describe the network's central computer which transmits messages to and from the computers of ATM owners and network participants.

financial institutions are members of HarMoney.(7)

Under this arrangement, Wegman's owns the ATM and is responsible for loading the machine with cash, and issuing the required receipts. Each day, Wegman's removes the intended deposits from its machines and transmits them to the designated HarMoney member financial institutions. Under the HarMoney user agreement, Wegman's acts as the depositor's agent and risk of loss remains with Wegman's until the intended deposits are received at the designated depository, where deposited checks are sent through the regular clearing process.

When a customer uses the ATM for a withdrawal (or a cash advance from a line of credit), the ATM dispenses cash provided by Wegman's, but only after electronic approval has been received (through the switch) from the customer's financial institution. Once the transaction is approved by the customer's financial institution (which occurs while the customer waits), the customer's account is debited and Wegman's account is credited in the identical amount. Wegman's account is also credited with a transaction fee

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7. Other HarMoney members are: Pittsford Federal Credit Union; Griffiss/Oneida Federal Credit Union, Rome, New York; SeaComm Federal Credit Union; Elmira Savings Bank; 1st Federal S&L, Rochester, New York; 1st National Bank of Rochester; Salamanca Trust Co.; Manufacturers Hanover, N.A., Rochester, New York; National Bank of Geneva.

paid by the customer's financial institution for each transaction made by one of its customers through the Wegman's ATM.

Notwithstanding the language of the McFadden Act and the Comptroller's regulation and interpretations, the court found that the ATM was a "branch" of Marine Midland, N.A., under federal law, even though Marine did not own or rent the ATM. Home office protection provisions of the New York Banking Law prohibit the establishment of a branch office of another bank in small communities like Canandaigua because of the presence there of the head office of The Canandaigua National Bank and Trust Company. Thus, the Wegman ATM was found to constitute an unlawful branch of Marine Midland (and, inferentially, of the other three national banks in the HarMoney system).

Significantly, the court concluded that it made no difference whether state-chartered banks might be permitted to share the ATM under interpretations of state law, even though the principal purpose of the McFadden Act was to help assure "competitive equality" between national and state banks. The District Court's decision, if upheld on appeal, could seriously jeopardize or eliminate participation of national and state member banks in shared networks. It thus will produce competitive inequality and thereby undermine the congressional intent behind the federal banking laws.

NEED FOR CONGRESSIONAL ACTION

Marine Midland, Bank, N.A., has filed an appeal with the Second Circuit requesting reversal of the decision. The Comptroller, the Board of Governors of the Federal Reserve System, Consumer Bankers Association, MasterCard International, Inc., the Electronic Funds Transfer Association, Visa, Plus Systems, Inc., and others have joined Marine as Amicus Curiae. Though we understand congressional concern about enacting legislation while litigation is pending, we believe that prompt passage of S.2898 is critical. The district court itself recognized that the law has not kept pace with technological changes, and regretted that new banking services must be evaluated against strained interpretations of a 50 year old federal statute:

> This court is faced with the dilemma of interpreting the legislative intent of a 1927 federal banking statute in an effort to determine if the "computer banking" at issue in this case would have been considered "branch banking" by the Congress when it passed the McFadden Act more than 50 years ago.
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> (A) perfect solution may not be within the power of the judiciary and may better be left to the legislative branch.... (IBANYS v. Marine Midland, W.P.N.Y. Civ-83-1006T, April 6, 1984, at page 1.)
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> The application of a 50 year old statutory definition to the type of technology which could never have been dreamed of at the time the legislation was enacted is fraught with inconsistencies which are not

> easily recognizable. (Id. at 15).

We believe it is proper for Congress now to state clearly that shared ATMs are not branches, before any more damaging effects of the court case are felt.

For example, if the decision is affirmed, it would become law in the entire Second Circuit, consisting of the states of New York, Connecticut, and Vermont. A number of national and state member banks located within the Second Circuit are principals, i.e., major financial contributors and policy makers in many regional and national ATM networks. Not only would they face enormous economic losses of their own, but they would also probably have to withdraw their support, expertise and equipment from the networks. Without the involvement and the transaction volume of the national and state member banks, entire systems may collapse.

We could then expect that additional suits would be filed throughout the United States by protectionist groups to bar other national and state member banks from participating in shared systems. Such fallout could effectively destroy the viability of those systems nationwide.

Successful lawsuits would prohibit customers of national and state member banks within the states of the Second Circuit from accessing their accounts through any state, regional and national system. In the process, customers of national and state member banks located within and outside the Second Circuit would be unable to access their accounts through shared ATMs located within the Second Circuit. Trying to explain these complex restrictions to consumers would be a nightmare for bankers who could offer no explanation other than "it's the law."

Similar suits would undoubtedly be filed in other circuits, and the courts in these cases would not be bound by the Second Circuit decision even though this Circuit is highly respected and courts generally tend to follow each other. Other courts could reach opposite or differing conclusions and the uncertainty of a patch work of holdings would further threaten the viability of our national payments system.

S.2898 IS A ONE-ISSUE BILL

Senators Trible and Humphrey introduced "The Banking Convenience Act of 1984" in order to maintain the status quo as it existed before the IBANYS v. Marine Midland decision. The bill would permit the continuation and further development of shared ATM networks under the same conditions that existed before the decision, because S.2898 essentially codifies the Comptroller's regulation that excepted shared ATM's, i.e., those that were not "owned or rented" by national banks, from branch restrictions under the McFadden Act. We understand this to be the sole purpose of the bill, and it in no other way is intended to affect the equilibrium of federal and state banking laws.

Further, we acknowledge that there are many geographical inequities and anomalies in the financial services marketplace that could conceivably be resolved in this bill. For example, all federally-chartered thrift institutions(8) and credit unions, all non-depository institutions (including large nationwide companies such as Safeway and Publix supermarkets, the retail firm of Sears, Roebuck & Co., and the brokerage firm of Merrill Lynch Pierce Fenner & Smith, Inc.)(9) and many state-chartered depository institutions are not subject to any restrictions

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8. See Federal Home Loan Bank Board Remote Service Unit Regulations, 12 C.P.R. §545.141(a)(3) (RSU's, which include ATMs, are not branches). See also D. Baker & R. Brandel, The Law of Electronic Fund Transfers, (1983 cum. supp) ¶22.01(2) p. S22-8 (twenty-three states have passed legislation which consider EFT terminals not to be "branches." As of the date of this testimony, it is our understanding that approximately 40 states have now passed such legislation.

9. In June, 1984, Merrill Lynch Pierce Fenner & Smith, Inc. "began allowing clients access to their Cash Management Accounts through automated teller machines in 76 Safeway supermarkets in the Los Angeles area. Merrill Lynch said this is the first step toward allowing holders of these investment accounts to have access to such machines anywhere in the nation." Los Angeles Times, June 18, 1984, at Part IV, p. 2, col. 5.

on their ownership of ATMs, their geographic deployment, or the ability to participate in shared ATM networks. These other institutions may deploy proprietary ATMs anywhere.

In the past, CBA has testified before this Committee in support of an amendment to the National Bank Act that would permit unrestricted nationwide deployment of proprietary ATMs. We also believe that the law should not retain artificial barriers that limit consumer financial services through ATMs. Thus, even though we are aware that some states restrict interstate deposit taking, and even though we are strongly opposed to such restrictions as they serve no discernable public policy, we support S.2898 which, in our view, does not affect those state policies at all.

The competitive inequalities for banks are numerous and complex, and deserve further congressional consideration in the context of a comprehensive review of the geographical restrictions under the McFadden Act and the Douglas Amendment. But they do not need to be resolved, or even addressed, at this moment, and they should not be. The issue presented by IBANYS v. Marine Midland and addressed by S.2898 is critical and very narrow. It truly cannot wait for resolution at some later time without immense disruption of existing systems, system investment and development, and without immense inconvenience to bank customers. A limited and immediate solution is to pass S.2898.

The time is ripe for Congress to acknowledge the incredible growth of electronic technology and to reaffirm the authority of the Comptroller to interpret the McFadden Act as it applies to a technology that was unimaginable when the Act was passed more than half a century ago. Congress can do so, in the narrow fashion needed to fix the immediate problem, by enacting S.2898.

S.2898, does _not_ tackle these many broad questions. It is concerned only with correcting the Marine Midland decision.

ANALYSIS OF S.2898

You have asked us specifically to analyze the provisions of this bill.

(1) The opening language of the amendment states:

> (i)(1) Notwithstanding any other provision of this section or of a similar state law;

We believe this is meant to apply only to the definition of a "branch" and the limitations on branching as found in federal (the McFadden Act at 12 U.S.C. †36) and state law. The phrase "or of a similar state law" should be interpreted narrowly to confirm judicial decisions that the definition of a national bank branch is a matter controlled by federal law. We understand that some fear this language would also preempt any state law regulating the functions of ATMS shared by national banks. We do not agree with this interpretation, nor do we believe from the introductory remarks accompanying S.2898 that this was the intention of Senators Trible and Humphrey. However, because of the concern that the reference to state law would allow nationwide deposit taking through shared networks, we suggest that it be removed. This change should remove questions on the deposit taking issue.

As the courts have stated many times, 12 U.S.C. 36(f) merely addresses how, when, and where a national bank can branch in accordance with state law. Other questions about the mesh of federal and state regulatory authority can and should be left to another day.

As a technical matter, the "notwithstanding" clause quoted above might be moved to follow the word "and" on line 11 of the printed bill. We believe this would clarify that state law was displaced only to the extent it purported to define "branch" for national banks.

(2) The effect of Section (i)(1) is to clarify that an ATM which is not "established" but that is "shared" is not a branch for the purposes of 12 U.S.C. 36(f). Amended paragraph (i)(2)(A) of that section would provide:

> (A) an automated device is established by a national bank only if it is owned or rented by the bank; (emphasis added).

The legislation thus affirms and reinstates the Comptroller's regulation and interpretations as they existed before Marine Midland case. The provision recognizes that there are different types of legitimate financial arrangements in shared systems. For example, there are many national and state member banks that want to offer their customers access to shared systems but do not have the resources to provide them independently. This section would permit those institutions to participate provided that they did not, in fact, own or rent the ATM. Concern has been expressed that "owned or rented" could be interpreted liberally by the Comptroller. We submit that there is ample jurisprudence in federal and state law as to the reasonable and proper interpretation of those phrases. (See also Footnote 10)

We would reiterate that this legislation's sole purpose is to allow national banks and state member banks to continue to participate in shared systems only.

(3) Section (i)(2)(B) states:

> (B) an automated device is not established by a national bank if the bank is assessed transactional fees or similar charges for its use.

This clarifies that transaction fees or similar charges are acceptable forms of compensation that may properly be arranged in shared systems, and that such forms of compensation are not an indication that a lease arrangement exists. In conjunction with Paragraph (A) this would permit institutions to enter into arrangements that are tailored to meet their respective needs and the demands of their customers. It does not, in our opinion, either encourage, or provide protection for, a "sham" arrangement, in which an institution circumvents the law and, in effect, provides a proprietary or wholly owned system to customers, rather than a shared system. A recent ruling by the Comptroller clearly demonstrates that he will act to prevent any such "shams."(10)

In summary, S.2898 merely maintains the status quo of the law before the New York court decision. It resolves the narrow issue of whether a shared ATM is a branch under the McFadden Act.

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10. The Comptroller has conscientiously adhered to the owned or rented distinction even if it required a determination that an ATM was a branch under the McFadden Act. For example, in one instance, a national bank proposed to make available to banks in a particular state an ATM "sponsorship" arrangement. Under this arrangement, a sponsoring bank would have been able to station its personnel at the ATM during its first 90 days of operation and have its name listed first in the list of participating banks. A sponsoring bank would have been required to pay the national bank an initial installation charge as well as a monthly rental payment, although the national bank maintained actual ownership. A sponsoring bank also would receive a transaction fee for each transaction originated by customers of other banks on the sponsored ATM.

In response to this proposal, the Comptroller's staff stated that the sponsored ATMs were branches of both the sponsoring bank and the national bank. In explanation the Comptroller's staff stated:

> Not only does a sponsoring bank pay a fee that has all the indicia of a rental fee (and one that is so labelled in the contract you submitted), but it also shares in the profits generated by the terminal. Moreover, a sponsoring bank's personnel will be temporarily stationed at the CBCT (ATM). A sponsoring bank will have a stake in the success of the CBCT it sponsors and its name will be prominently associated with the CBCT. Under these circumstances, I believe that a sponsored CBCT will be a branch of both the (national bank) and the sponsoring bank.

Interpretive Letter from Peter Liebesman, Assistant Director, Legal Advisory Services Division, Office of the Comptroller of the Currency, Fed. Banking L. Rep. (CCH) ¶85,269 at 77,407-408 (1981-82 Transfer Binder) (May 12, 1981).

This ruling not only underscores the rationale for distinguishing between ATMs that are owned or rented and those that are not, it further emphasizes the Comptroller's resolve to ensure that the distinction is enforced. The Comptroller has made a reasoned decision in this area, and has enforced that decision.

The clarification of the definition of a branch is crucial to any legislation addressing this issue because of the explicit intra and interstate branch limitations in Section 36(c) of the McFadden Act, 12 U.S.C. §36(c). (See Appendix A). In addition, the bill delineates the distinctions between "shared" and "established" systems in a sensible manner that is essential for banks to determine permissible activities.

The bill only preempts such state law as would characterize a shared ATM as a branch of a national or state member bank. It simply does not address broader questions of whether the Comptroller or the state has the authority to regulate the functions performed at an ATM. The complexity and controversy raised by these questions warrants congressional consideration, but it should be in the context of a comprehensive review of the McFadden Act and Douglas Amendment.

THE CSBS PROPOSAL

You also have asked us to comment on proposed revisions to S.2898 submitted by The Conference of State Bank Supervisors (CSBS).

The proposal from CSBS reflects policies and goals long sought by the state regulators. The tension of the dual banking system has meant that state authorities are constantly trying to maintain or expand their regulatory authority over national banks. However, the courts have consistently maintained that Congress sets the rules for national banks. For instance, in 1877 the Supreme Court stated:

> "National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the government may permit."

Van Reed v. Peoples National Bank 198 U.S. 554 (1877). This holding has been followed by the Court in recent years. See: Mercantile National Bank v. Langdeau 371 U.S. 555 (1962).

In the McFadden Act, the Congress told the Comptroller to look to state law for the very narrow purpose of determining where, how and when a national bank can locate a branch. When litigants have argued that this recognition of state law should be expanded further, the federal courts have continuously refused:

> We reject the contention made by *amicus curiae* National Association of Supervisors of State Banks to

> the effect that state law definitions of what constitutes "branch banking" must control the content of the federal definition of Section 36(f). (footnote omitted) Admittedly, state law comes into play in deciding *how*, *where*, and *when* branch banks may be operated, *Walker Bank*, supra, for in Section 36(c) Congress entrusted to the States the regulation of branching as Congress then conceived it. *But to allow the States to define the content of the term "branch" would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in Section 36 of a general definition of "branch".* On this point the language of the Court of Appeals perhaps overstated the relation of state law to the problem, since the threshold question is to be determined as a matter of federal law, having in mind the congressional intent that so far as branch banking is concerned "the two ideas shall compete on equal terms and only where the States (allow) their own institutions (to) have branches." In short, the definition of "branch" in Section 36(f) must not be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in *Walker Bank* supra. 396 U.S. at 133-134, 90 S.Ct. at 343.
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> *Illinois Ex Rel. Lignoul* v. *Cont. Ill. Nat. Bank* 409 F. Supp. 1167, 1172 (N.D. Ill. 1975).

CSBS is asking this Committee to transfer power over national institutions from the Congress to the states, which the Supreme Court and other federal courts have refused to do.

CSBS does this by proposing that the language underlined below be added to Section (i)(1) of S.2898:

> (i)(1) Notwithstanding any other provision of this section or of a similar state law, a national bank may share, or permit its customers to use, an automated device that is not established by that bank, and such automated device shall not be considered a branch of that bank within the meaning of subsection (f) of this section *if such automated*

> device is otherwise established and operated in compliance with all pertinent state laws regarding its location, ownership, operation and permissible functions.

CBA has carefully reviewed this proposed revision and cannot support it. It would change the current status of the law and expressly recognize that state laws govern not only the location, but the ownership, operation and permissible functions of ATMs owned or shared by national banks. The CSBS provision, in other words, would resolve--in favor of state law--those very questions that the sponsors of the bill did not intend to address, that are not at issue in the IBANYS v. Marine Midland case, and that merit full Congressional discussion and debate separate from the narrow question of defining a branch bank.

We would also oppose the CSBS proposal on the merits, for we believe that the operational powers of national banks are properly matters of federal law, to be set by Congress and the Comptroller, and not subject to the vagaries of state law.

Subsection (c) of 12 U.S.C. §36 (See Appendix A) provides that the Comptroller may approve the application of a national bank to establish and operate a new branch at any place that state laws expressly authorize state banks to do the same. In short, the Comptroller must consider state law restrictions on location when he approves branch applications. For instance, the courts have clearly held that state laws respecting community needs and convenience, the effect on competition, distance from another bank's branch, capital requirements, and prescribing the means of acquiring a branch must be followed.

We do not believe, however, that this section requires the Comptroller to look to state law for the permissible functions that may be performed within a branch or even through a shared system. We have extensively reviewed the caselaw under Section 36 and have not found a case that addressed the issue of whether the states have the authority to legislate or regulate the functions performed or operations within a national bank branch. Courts have looked at certain functions performed at a facility _only_ to determine whether the facility was a branch under the McFadden Act and have held that the definition of a branch is controlled _only_ by federal law.

With regard to "ownership" of an ATM, as the term is used in the CSBS language, we cannot see any reason why a state should be able to dictate the conditions on which a national bank may own an ATM. On the operations issue, the examination function of the Comptroller is supposed to regulate this area. We could not support the suggestion that states should be able, in effect, to _examine_ national banks.

We do not believe that states presently have the authority to regulate the functions performed by national banks, even indirectly by setting conditions for participation in shared systems. Similarly, we do not believe that the scope of S.2898 should be revised to expand state authority or narrow the Comptroller's prerogative in this area. We cannot support the contention that Congress intended the McFadden Act to limit the functions of national banks to only those permitted to state banks. From our reading of the legislative history and court decisions under the McFadden Act, it is clear that its sole purpose is to allow national banks to branch in a competitively equal manner with state chartered banks. There is no evidence that Congress in 1927 intended to give states authority to regulate directly or indirectly the functions and powers of national banks.

In any event, it is not necessary to choose between our views on this matter, and those of CSBS. For example, it is our understanding that approximately eighteen (18) states prohibit deposit taking at shared ATMs. S.2898 in its original form is absolutely neutral and does not address this state action. The sole issue to be addressed by the pending legislation is the critical question of whether a shared ATM is a branch of a national or state member bank. The bill should not become the vehicle for deciding who has the authority to do what, but should permit the systems to continue and to develop under the status quo before the *IBANYS v. Marine Midland* decision.

CSBS has also proposed the following revisions to S.2898:

> "(2) For the purposes of this subsection --
> "(A) an automated device is established by a national bank only if it is owned, *rented*, *or controlled exclusively* by that bank;
> "(B) an automated device is *presumed to not be* established by a national bank if the bank is assessed transactional fees or similar charges for its use; and
> "(C) the term 'automated device' includes, without limitation, automated teller machines, customer bank communication terminals, point-of-sale terminals, and cash dispensing machines."

The additions and deletions apparently reflect CSBS's concern that an institution could circumvent the law by entering into a "sham" arrangement where, for some type of fee, it would be able to establish proprietary ATMs anywhere. We agree that these shams should be prohibited, but we believe that the original bill does so quite effectively. The additional language, especially "exclusively controlled", is too broad and vague to accomplish the purpose. The "presumption" invites challenging litigation. The language could sweep in and prohibit legitimate financial arrangements that enable institutions with limited resources to participate in shared systems. To give guidance to the Comptroller and the courts, the legislative history might include examples of "sham" arrangements that would be prohibited under S.2898 as it is presently written.

Furthermore, as a technical matter the proposed amendments are somewhat inconsistent and create uncertainty as to their application. One corcern arises in Section (i)(1) where the word "established" is used in two different senses. The first time it is used is in the context that "an automated device is _not_ established" (emphasis added). The definition of "established" in Section 2(A) states that a device is established only if it is "owned, rented, or controlled exclusively," and this is further refined in Section 2(B) which states that it is "presumed not to be established by a national bank if the bank is assessed transactional fees or similar charges for its use." Here "established" is defined in terms of a proprietary interest.

One could interpret the provision to mean that an ATM device is not a branch if it is established by another entity and operated in compliance with state law. Does that mean that the onus is placed on those who want to share to make sure that all other participants (within systems that could comprise several thousand ATMs) are operating in compliance with pertinent state law? If this is true, and if one member is not in compliance with all pertinent state law, who is in violation of the applicable law, the sharing or establishing entity? Further, does this mean that for national bank members of shared systems, that each non-conforming ATM retroactively becomes a branch?

We raise these questions because we believe that S.2898 resolves the "branch" problem in a straight-forward manner. Attempts to accomodate other concerns only raise more questions that obscure the vital interest we all share in seeing that the networks continue to operate. We ask that the broader issues be deferred and that this measure be passed to solve the immediate problem.

HOME OFFICE PROTECTION

The issue of home office protection statutes, i.e., measures to protect the viability of banks in small communities, was also raised in IBANYS v. Marine Midland, and is addressed by inference in the CSBS proposal, to the extent it would retain state limitations. CBA believes that these protectionist statutes do not serve the interests of consumers since they allow only one provider of financial services in a community. But we also believe that S.2898, as written, would not unduly interfere with those laws. The bill would affect such state laws to the extent they treated ATMs explicitly as branches. But where the state law characterized ATMs, for home office protection purposes, as satellites or other types of facilities, the question of the applicability of those laws would fall into the same category as questions about state limitations on ATM functions. In any case, we believe it would be appropriate for the Comptroller to take state home office protection laws into account in applying the convenience and need standards, when explicit in state law, for national bank activity.

In conclusion, CBA supports S.2898. Its enactment would avert the potential dismantlement of an electronic fund transfer system that is widely used and enjoyed by consumers. It would also avoid the substantial economic losses faced by national and state member banks that have invested vast resources in the systems. At the same time, it would continue to ensure that the McFadden Act's goal of competitive equality between state and national banks is met.

We urge you to enact this legislation and thank you for the opportunity to testify today.

Senator GORTON. Thank you, Mr. Brandel.
Mr. Hamlin.

STATEMENT OF GEORGE W. HAMLIN IV, PRESIDENT, CANANDAIGUA NATIONAL BANK & TRUST, AND PRESIDENT, INDEPENDENT BANKERS ASSOCIATION OF NEW YORK, INDEPENDENT BANKERS ASSOCIATION OF AMERICA

Mr. HAMLIN. Mr. Chairman, members of the committee, I am George Hamlin and I'm pleased to appear before you on behalf of the Independent Bankers Association of America [IBAA]. I'm here wearing many hats today. I am also president of the Independent Bankers of New York, plaintiff in this suit, and president of Canandaigua National Bank, coplaintiff in the suit; also a taxpayer.

The legislation which is the subject of your hearing today has been introduced in response to a situation with which I am intimately familiar because I filed an appearance in the court when it was argued below. Before my banking career, I was a lawyer.

For your information, the IBAA position and the IBANYS position on such matters may differ from time to time, but in this particular case we are of one mind.

You have my prepared statement before you to read and I'd like to just comment on some of the things that have been said already today and to focus your attention if I can on what was said in that case as opposed to what was not said.

I believe there's been a tremendous distortion of the facts, the significance of this opinion, the effect of an affirmation in the second circuit, and that if once you understand what really went on you will see that the necessity of this bill is largely voided and that the fundamental policy considerations underlying home office protection and other kinds of such statutes are still as valid today as they were 50 years ago. And I'm not talking about just protected markets. Everybody seems to talk about protecting little banks. Obviously we don't need any protection. Again, the Canandaigua National Bank is $150 million. We have three or four branches in which there are ATM's. Our ATM's were in place 3 years before the competition moved into our area.

This presents a very interesting case in view of the fact that Marine Midland doesn't have any banking facilities in our market area.

It presents another interesting issue because the ATM's are not owned or rented by the bank. Namely, it's owned by a third party, namely Mr. Wegman. Mr. Wegman is a very successful grocery store operator who has 30 megastores in the upstate New York area. He happens to be a customer and a friend and in fact his stepson is our associate counsel in this lawsuit. I'm very careful not to return Mrs. Wegman's checks.

HOLDING OF DISTRICT COURT IS GENERALLY CORRECT

The points that need to be focused upon in order to clarify the massive misinformation that's been floating around is that the holding of the district court case is generally correct by the finding that the utilization of the ATM located in the Canandaigua Wegman store constitutes a branch under McFadden with the result that such utilization is deemed unlawful when you consider the State banking laws and those laws which relate to branching, namely home office protection.

Incidentally, home office protection—you can branch anywhere you want in New York State with the exception of small communities in which there's located the home office or the headquarters of a bank, and there are about 70 small communities in the State that are affected by this. So the major markets—98 or 99 percent of the market in New York State are completely free for branching.

The reports of the death and demise of EFT services across the country which may result from the affirmation of the case on appeal are greatly exaggerated. And finally, while legislative refinement which may be desirable at some point in the future, careful review of this and other cases should be had first lest we be guilty of throwing the baby out with the bath water.

It's very important that we maintain the dual banking system, a balance between national interests and State interests. That's something that's worked well for the country for the last 60 years and would certainly do well in the next coming decades.

We are all familiar with the facts of the case but let me just review them briefly with you. I think it's instructive to even use the facts as outlined by the court, to be very brief. "All parties concede"—and I'm reading right from the opinion of Judge Telesca of the Federal District Court of the western part of New York State:

> All parties concede that the relative facts are not in dispute. In the summer of 1983 Wegman's installed an ATM in Canandaigua. Shortly thereafter Wegman's entered into a contract with Marine to provide data processing services to tie the Canandaigua Wegman store into the Harmoney network. Customers of the Harmoney member financial institutions, of which Marine is one, may by placing a card in the machine contact the bank for the purposes of making deposits, withdrawals, balance inquiries and the like. It's a full service ATM. Under this arrangement, Wegman's retains ownership of the ATM and is responsible for loading the machine with cash and issuing receipts and so forth. Wegman's has no access to the secure container which Marine picks up on a daily basis. Accordingly, the ATM and its owner, Wegman, will not dispense funds to the customer in excess of the amount of the Marine bank account because before funds are dispensed there's communication with the bank to verify the fact that the funds are available and there is at the end of the day a clearing account which is a technical matter and sets the record straight. Once a transaction is approved by Marine, which occurs while the customer waits, the customer account is debited; the Wegman account is credited by the identical amount. Wegman's account is also credited with a transaction fee made by Wegman, paid by Marine for each transaction made by one of its customers through the ATM.

It's this factual background this case rises. Now Marine has two roles here. Marine holds deposits for its own customers and it's also a data processing switch operator. It contracted with Wegman in the latter to provide data processing for machines that were owned by Wegman.

In its former role, of course, that is what we object to because it was providing branch operations, branch banking for its customers, in an area in New York State where national banks could not branch.

The issue is clearly stated and we all agree that if Marine owns or rented the ATM it would be a branch because if it's located in Canandaigua under State statute it would be prohibited, as all branches are, by section 105 of the State banking law. This case is the first case to look at whether or not ownership in the title sense makes any difference. Of course, the court felt that it didn't.

The holding of the case is important and I will read it directly because I'm going to draw some distinctions on the exact wording that's used here:

> I hold that Marine's present utilization of the ATM machine in Wegman's Canandaigua store constitutes the operation of a branch within the meaning of section 36(f) and that such activities are therefore unlawful pursuant to section 36(c), in conjunction with New York banking law section 105. Accordingly, the plaintiff's motion for summary injunction is granted and the utilization of the Canandaigua Wegman's ATM is enjoined.

TECHNICALLY AN INTRASTATE CASE

The present utilization at a location in Canandaigua is what is unlawful under State law. That's as far as this case goes. This case is as important for what it does not say as much as for what it does say. It does not outlaw interstate EFT networks at all. Technically, this is an intrastate case and fact situation. It could never be a precedent for interstate cases. That would require a different lawsuit arising out of interstate factors.

It is the location in New York, of the terminal that is the key. If it were in Rochester, NY, a principal metropolitan area about 25 miles away, such would not be a branch and it wouldn't be a branch for interstate purposes either. Thus, it is the location of the terminal that determines whether or not the utilization of a given machine constitutes branch operations. That is the point that's being missed in the format here.

The court could find no basis in law or in common sense to have such characterization of such utilization depend upon concepts of ownership and title. I think I could put it very clearly. We maintain 10 employees in the Wegman store in a full service branch with its own ATM through the wall. The subject ATM is about 10 or 12 feet away. The customers of Wegman and the people of Canandaigua are not being underserved by the community independent bank. Quite to the contrary, our ATM there does 8,000 transactions a month and was there a good 2 or 3 years before Marine came in or a major commercial competitor introducing ATM's in that area. So the characterization of "Sleepy Hollow" or backward is not appropriate in this case. Now that's never said directly, but I sense it's implied.

The proposed bill throws the baby out with the bath water and this is why. It undermines the dual banking system and invades the deposit base of rural community banks without a commensurate return. That is the fundamental policy. That is why we brought this lawsuit.

You may be surprised to know that our ATM's for the last 3 years—and this goes from day 1—collected more money than they dispensed on a ratio of 3 to 1 and that's been true in our other locations which are either through the wall branch locations or in other grocery stores in our market area.

When I have questioned our major competitors about the breakdown between withdrawals and deposits, I'm surprised to find out they don't know the answer to that question. But I would like to go on record here as clearly stating that in our case for the last 3 years from day 1, that the machine has taken in significantly more dollar volume than it has dispensed. Thus, when we talk about ATM's as a deposit gatherer, we're talking about real money.

I happen to have here a report for August and it's the same situation. It's now down to 2 to 1, but it's a significant gatherer of deposits. That's very important for a rural community.

Why should Marine take deposits out of our market area, an area in which they maintain no brick and mortar branches, without serving the full market that's dealing in that that I have to? I'm talking about food stamps and a whole list of other things I won't go into, but I'm talking about full service banking. They certainly don't dispense food stamps through an ATM, nor will they ever.

Senator Gorton. Mr. Hamlin, we're going to have to ask you to summarize your statement promptly.

Mr. Hamlin. I will conclude. Every regional bank knows it collects deposits in the rural areas and doesn't invest back there to nearly the same degree. Community banks should not have to undergo the overheads in order for a parity to exist between competition. We preserve a level playing field here by restricting all sides to the same rules and burdens. Community banks are healthier, more efficient, financially sounder than our larger competition; and thus they should be preserved from a consumer's standpoint. You raised those issues about whether the consumer is benefited. Well, if you're undermining the community banks across the United States, of which there are 13,000 of them smaller than us, you're talking about a significant impact.

A legislative response at this point would be inappropriate. I hope I have demonstrated that it's not required. You should understand that there's a difference between ATM's from a procedural standpoint and from a substantive standpoint. We are in favor of the procedural consolidation. There's no sense in having every user of an ATM file for a branch application. That's ridiculous.

On the other hand, an affirmation of the case below will merely say that you can't put an ATM in a community regardless of the State where that State's law prohibits that. It doesn't prohibit interstate switching. It doesn't undo the investment of $200 million or whatever the figure may be that people have been talking about. Therefore, I would just point out to you that I feel that there has been misinformation of this very complex issue. Perhaps the debate should be shifted a little bit, and rather than talking about the distortions we should talk about the real case here, the real policies which are just as valid today as they were 50 years ago. I think it's inappropriate to have a legislative response, if I may offer, before the jury really is in. We argue the appeal on October 1 in this case in New York City.

Thank you for your attention.

[The complete statement follows:]

STATEMENT BY GEORGE W. HAMLIN, PRESIDENT, CANANDAIGUA NATIONAL BANK, CANANDAIGUA, NY, AND PRESIDENT OF THE INDEPENDENT BANKERS ASSOCIATION OF NEW YORK, REPRESENTING INDEPENDENT BANKERS ASSOCIATION OF AMERICA

Mr. Chairman and Members of the Committee, my name is George W. Hamlin, IV, and I am pleased to appear before you today on behalf of the Independent Bankers Association of America (IBAA). IBAA represents more than 7,500 community banks located in forty-nine states and the District of Columbia.

The legislation which is the subject of your hearing today has been introduced in response to a situation with which I am very familiar. For I am both the current President of the Independent Bankers Association of New York State (IBANYS) and the President of the Canandaigua National Bank and Trust Company of Canandaigua, New York. For your information and background, IBAA and IBANYS are legally separate organizations. Not every New York member of IBAA belongs to IBANYS, and vice versa. Member banks pay separate dues to each organization. Further, IBAA and IBANYS espouse differing positions on some public policy issues. Nonetheless, the two organizations maintain close informal ties and are united in their dedication to the preservation of a banking industry marked by a diversity of the size and function of its constituent parts.

While I hope that my very close involvement in the IBANYS vs. Marine Midland lawsuit will assist you in these hearings, my appearance today is solely as a representative of IBAA.

In my testimony today I shall make three major points:

1) The U.S. District Court for Western New York was correct in its general finding that an automated teller machine (ATM) is a branch for McFadden Act purposes, regardless of the machine's ownership.

2) The dire predictions that Appeals Court affirmation of the IBANYS decision will lead to a gross and instantaneous dislocation of electronic funds transfer (EFT) services constitute inaccurate exaggerations disseminated by parties who seek to utilize this decision as a means of overturning the policy of competitive equality within a dual banking system established by the McFadden Act.

3) While some Federal clarification of the treatment of ATMs under MacFadden may be desirable, S. 2898 cannot presently be supported by IBAA because it would eclipse the state role in the evolution of EFT services, and would permit proprietary interstate deposit-taking through contractual subterfuge. At this juncture, Federal clarification is best undertaken by the Appeals Court under existing legal precedents.

At the outset, a brief review of the factual underpinnings of the IBANYS decision may be useful. Branch banking and home office protection were enacted simultaneously in New York in 1934. The home office protection policy prohibits any state bank from branching into a community of 50,000 persons or less in which another bank is headquartered. By operation of the previously enacted (1927) McFadden Act, as reinforced by the Banking Act of 1933, that location restriction applies equally to national banks. The legislative history of home office protection indicates that its purpose was to assure the continuing viability of local lending institutions and to counteract, in the words of its 1934 legislative report, "the natural tendency for many of these branches to become mere receiving stations for deposits with the resultant transfer of local money to the use and benefit of metropolitan centers." Seventy-nine of IBANYS' ninety-six member banks are located in the smaller New York communities entitled to such home office protection.

In 1983, Wegman's Food Markets, Inc., an upstate New York supermarket chain, installed an ATM machine in its store in Canandaigua, NY. My bank has a full-service branch location in the same supermarket store including our own ATM accessible 24 hours per day. Wegman's entered into a contract with Marine Midland Bank to connect the ATM to Marine's Harmoney EFT network. Despite Wegman's proprietary relationship to the ATM, it is Marine Midland which provided the bulk of services required for the proper functioning of the ATM.

New York law clearly held that an ATM was a branch of each bank using it for deposits, withdrawals, or credit card advance functions.* Inasmuch as Marine Midland does not conduct, and is not permitted to conduct, brick-and-mortar banking operations in the environs of Canandaigua, it was apparent that Wegman's ATM when used by Marine's customers constituted the very danger which New York law was designed to prevent--it was functioning as a "mere receiving station" by which deposits were transferred out of a locality, with little likelihood or means by which they could be returned to meet local credit needs. Consequently, litigation was brought asserting that Marine's use of the Wegman's ATM violated the McFadden Act, as it incorporates New York's Home Office Protection aw, and that Wegman's ownership of the ATM constituted illegal banking under New York law.

On April 6 of this year, the U.S. District Court for Western New York found in plaintiffs' favor on the first charge, and for Wegman's on the second. Marine Midland subsequently appealed. Plaintiffs subsequently cross-appealed the Court's decision regarding Wegman's. Briefs have now been filed and the Appeals Court is expected to rule later this fall, after hearing oral arguments early next month.

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*Recently, New York amended its banking statutes so that an ATM is not deemed to be a branch of state-chartered institutions unless it is located in a home office protection community.

There is no doubt that an ATM is a branch under Federal Law. The McFadden Act broadly defines a branch as any place of business "at which deposits are received, or checks paid, or money lent." All three of these functions were performed by the ATM in Wegman's supermarket by Marine customers. The Supreme Court has held that any one of the three functions is sufficient to turn any facility into a branch. In the _Plant City_ case (396 U.S. 122; 1969) the Court stated:

> ....the term "branch bank" at the very least includes _any_ place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more...the offering of any one of the three services mentioned in that definition will provide the basis for finding that "branch" banking is taking place.

Similarly, in _IBAA_ v. _Smith_ (534 F.2d 921; 1976) the Federal Appeals Court recognized that electronic terminal banking was the wave of the future, and it held that these same legal principles required that an ATM established by a national bank be deemed a branch of that bank.

To reiterate, there is no room for dispute that, under applicable Federal statutes, an ATM is a branch. So the real question before the Court, and the issue which S. 2898 attempts to resolve, is whether a national bank "establishes" an ATM branch when it connects its data processing equipment to, and permits its customers to utilize, a machine owned by a third party.

Marine Midland sought to rely on a 1976 regulation of the Comptroller of the Currency (OCC) which, by staff interpretation in 1981, attempted to exempt such third party machines from being considered branches of the banks using them. By way of background, that regulation was put out by the OCC after its original regulation, which sought to exempt proprietary ATMs from being classified as branches, was struck down in the IBAA v. Smith case. The court there held that any facility which performs the bank functions of receiving or disbursing funds is a branch of a national bank "if the facility is established (i.e., owned or rented) by the national bank." Both the OCC and Marine attempt to rely on the owned or rented parenthetical in that decision to assert that a ATM which is not owned or rented by a bank itself is not a branch. The District Court correctly looked past the veil of ownership toward the banking functions which concerned Congress when it enacted McFadden, and thereby correctly overcame that distinction without a difference. Besides, Marine was in fact both paying rent in the form of transaction fees for the use of the Wegman's ATM, as well as receiving fees from other banks which utilized Marine's Harmoney EFT system via that ATM. Marine's relationship to the Wegman's ATM in fact constituted the type of sponsorship arrangement which even the Comptroller has recognized to constitute the establishment of a branch.

In an era when banks are encouraging, enticing, and sometimes even coercing their customers to utilize ATMS rather than human tellers, the law which holds that ATMs are branches is correct in a sense that goes beyond mere technicalities. And, since McFadden speaks in terms of functions, the District Court was correct in applying a functional rather than a proprietary meaning to the term "establish". Had the court ruled otherwise, it would have had to do so in the face of the competitive equality principle so carefully hammered out and reinforced by Congress and the courts over the past fifty years. A ruling in Marine's favor would have provided Marine with a substantial competitive advantage heretofore prohibited under Federal law by allowing it to branch into a New York community which competing state banks could not enter.

Despite the correctness of the District Court opinion, there is now a hue and cry that Congress should rush in and change the law before the Appeals Court can hear the arguments, review the decision, and issue its own ruling.

As a general rule, each of the several branches of government should display a decent respect for the procedures and decisions of the others, and should not snatch jurisdiction away from another branch simply because some party feels that they have a better chance of appeal in a new forum. IBAA feels that any Congressional response to the IBANYS case prior to the rendering of a decision by the Appeals Court cannot be justified. That Court is reviewing many long and sophisticated legal briefs. It will issue a decision which is confined to the intrastate application of New York law and the McFadden Act to the particular set of facts and circumstances before it, including an unusual contractual arrangement between a bank and a nonbank. There is no reason to believe that an affirmation of the District Court decision will have any immediate effect save to prohibit the entry into any home office community in New York by any national bank via a third party ATM, nor is there reason to believe that the Appeals Court will act in a manner that is out of step with the historic precedents of the Supreme Court as it has interpreted the McFadden Act.

Yet the supporters of S. 2898 would have this Committee believe that such affirmation would instantaneously bar much intra- and all interstate utilization of ATMs by national banks in all states, as well as cause the collapse of EFT systems in which many billions have been invested. This is utter nonsense. The decision, to the extent it has any interstate application, will have such only in the second circuit. Any further repercussions would require that suits be brought in other judicial circuits, based upon other facts and circumstances in relation to other state laws. That last consideration is especially important. For, according to information provided to us by the Conference of State Bank Supervisors (CSBS), thirty-seven states not only permit ATM sharing, but twenty-seven make such sharing mandatory to assure that EFT systems are not operated in an anticompetitive manner. Thirty-four states exempt ATMs from branching treatment, while only eight classify them as branches. And, perhaps most damaging to the tales of gloom and doom you will hear, thirty-six states provide for access to ATMs by the customers of out-of-state banks.

Thus, if the District Court decision is affirmed, as it should be, it will not send out a tidal wave of destruction. Rather, it will preserve the careful state/federal balance which has characterized the dual banking system throughout America's history. As noted, state involvement in the electronic funds transfer (EFT) realm has been considerable and should not be lightly overturned. The states have been generally permissive and procompetitive in their treatment of

ATMs, and their legislative involvement provides consumers with a local forum to protect their interests in the evolving electronic marketplace. State legislatures have been quite sensitive to the benefits which consumers can derive from ATM usage. But they have also recognized that convenience, while desirable, is a goal which must be balanced against such important public policy concerns as competitive equality and availability of credit to small business and agriculture outside metropolitan centers. This delicate balance, as it has been carefully worked out by the legislatures in Albany and in the other state capitals, should not be upset by a knee-jerk Congressional "solution" which is both unnecessary and untimely.

IBAA's general policy within the EFT area has been to support this state role and to encourage an evolution which permits effective participation of all banks. Many IBAA member banks belong to EFT systems which operate on an interstate basis, and we have no objections to such arrangements so long as they preclude deposit-taking. We have attached a copy of our 1984 Resolution on this subject, adopted by our National Convention in March.

The IBAA believes that any Congressional response to the IBANYS lawsuit would be inappropriate at this time. Any legislative response should occur, if at all, only after the judicial system has completed its role in this matter, and then only if effects adjudged detrimental to consumers and/or banks result from its ultimate disposition.

In particular, we would vigorously object to any Congressional Resolution which sought to influence the judiciary's further consideration of the IBANYS case, or to instruct it in the construing of its precedential value. It would be proper, but is now premature, for the Congress to respond to unintended detrimental consequences of this case through a change in the underlying statute. But it can never be proper for the legislative branch to seek to influence the decisionmaking of the judiciary through the advisory means of the resolution process.

Turning to S. 2898, IBAA finds that it must oppose this bill as introduced. First, S. 2898 would upset the shared responsibility and competitive equality, which now characterize the Federal/State balance on electronic bank branching, by directly undermining state laws. As a concrete example, national banks could utilize Wegman's Canandaigua ATM if S. 2898 was enacted into law, despite the fact that New York law, as reaffirmed in 1984, classifies all ATMs located in home office protection communities as prohibited branches, and despite the fact that no New York state-chartered bank could utilize that machine for deposits, withdrawals, or credit card loans. Second, S. 2898 could permit the establishment of proprietary deposit-taking networks by national banks through contractual subterfuge. As a hypothetical, Citibank could enter into an exclusive contract with the Southland Corporation to utilize ATMs owned by Southland and placed into every 7-11 store in the United States, for which Citicorp would be assessed transactional fees. These machines could be used for deposit-taking, with all transactions processed and switched by a Citicorp proprietary EFT network. Citicorp could further make this capability available to other national banks through a fee-splitting arrangement with Southland.

I hope that hypothetical makes clear that S. 2898 goes far beyond status quo legislation.

The changes proposed by CSBS to S. 2898 go a long way toward easing these concerns, as they look toward preserving a strong state role in the ATM area. However, as stated, IBAA does not believe that any Congressional action in this area would be appropriate until the judiciary has an opportunity to refine the IBANYS decision. As a practical matter, the onrushing end of this Congress means that we all will have ample time to study the wording and consequences of that decision before any revisiting of this subject next year.

That concludes my statement. I would be pleased to answer any questions.

McFADDEN ACT AND ELECTRONIC FUNDS TRANSFERS

The IBAA reaffirms its full support for the McFadden Act and its strong opposition to interstate branching. IBAA recognizes the apparent customer demand for the use of ATMs for the provision of cash dispensing services and, provided that ATMs are available to all banks on a nondiscriminatory basis, IBAA supports their use for this purpose.

The great majority of state governments have been and will continue to be active in designing electronic fund transfer system policies to meet their respective needs. Many have provided for statewide intrastate electronic facilities on varying terms and conditions, and some have allowed reciprocal electronic terminal extensions between themselves and other jurisdictions. The states should continue to have the decisive voice in determining the type of electronic banking structure best suited to their varying economies.

As electronic funds debiting and related transfer systems occur on an intrastate or interstate basis, the full opportunity of all depository institutions to share in the use of such systems is essential. IBAA urges that all regulations and legislation assure that all electronic funds transfer systems are conducted in a manner that will provide nondiscriminatory access and pricing in order to protect all depository institutions,regardless of size.

--Adopted by IBAA's 51st National Convention in New Orleans, March 1984.

Senator GORTON. Mr. Browning.

STATEMENT OF D. DALE BROWNING, SENIOR VICE PRESIDENT, COLORADO NATIONAL BANK OF DENVER, ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION

Mr. BROWNING. Mr. Chairman, my name is Dale Browning. I am senior vice president of the Colorado National Bank of Denver. I am currently serving as president of Plus System, Inc., a national shared ATM network, which has also filed with the committee its comments on the proposed legislation. I am here today representing the American Bankers Association. The American Bankers Association is the primary commercial banking trade association. Our members hold over 95 percent of the commercial banking assets in this country.

SHARED ATM NETWORKS ARE WOVEN INTO THE NATION'S BANKING

We welcome the opportunity to present our views on S. 2898 specifically, and our general views on electronic terminal deployment and use. I think we are all aware that at issue here is the continued participation of national banks in shared ATM networks. It is imperative at the outset that we recognize the extent to which shared ATM networks have been woven into the fabric of everyday life.

Currently, nearly 16,000 automated teller machines—40 percent of the 40,000 machines now installed in the United States are linked to 1 of almost 200 regional shared EFT networks, and each month the shared ATM's are performing an estimated 60 million transactions, one-third of the Nation's total ATM volume.

Approximately 7,500 banks have signed on with networks, an increase of 25 percent over last year.

Over 50 million ATM access cards carry the logo of a shared network, which represents over two-thirds of all debit cards in the country.

The growth in participation by financial institutions and use by customers of shared ATM networks has been phenomenal. If one message comes out of these hearings today, I hope it is that consumers and the banking industry alike will suffer if these networks are put out of business. This would be particularly detrimental to small banks that today can offer their customers the benefits of national ATM access to their depository accounts—and in so doing have been able to compete more effectively with large money center banks.

For over 8 years in reliance on legal precedents and regulations of the Comptroller of the Currency, the banking industry has invested hundreds of millions of dollars, if not billions, to develop and provide to consumers regional and national shared ATM networks. Earlier this year, however, a district court judge in upstate New York rendered a decision that jeopardizes the status quo that had existed for so many years.

The major problem growing out of the *Marine Midland* case is the finding that mere use of an ATM by a national bank customer renders it a branch of that bank under Federal law.

If the *Marine Midland* case is affirmed, customers of a national bank located in one State will generally be limited to using ATM's within that State. Interstate use of ATM's by national banks' customers will be prohibited. Without national bank participation the viability of virtually all shared systems will be threatened, which would substantially reduce convenience for consumers.

POSITION TAKEN BY THE ABA

If you will bear with me, I would like to talk briefly about the American Bankers Association's position on the legal status of electronic terminals.

Our association recognizes the desirability of an expeditious solution to the potential problems of the *Marine Midland* case. However, our long-term goals are:

One, EFT terminals should not be treated as branches.

Two, national deployment of terminals for nondeposit gathering functions should be allowed.

Three, limited interstate deposit taking should be allowed within an institution's natural market area.

We have also drafted a proposed piece of legislation to implement these principles, which is attached to our testimony for your review.

Obviously, such a comprehensive bill does not represent a viable approach to a quick fix for the current problem. However, these principles do represent our goals for treatment of the electronic terminal issue and we would find it difficult to support an interim measure which would be at odds with these goals, such as that proposed by the Conference of State Bank Supervisors. It is within that framework that we address the two proposals contained in your letter of invitation.

Your bill, Senator Trible, would specifically allow national banks to "share or permit its customers to use" terminals not "owned or rented" by that bank. This would clearly solve the problem. However, enactment of this provision could possibly raise the issue of interstate deposit taking by national banks which is presently an unsettled area of the law.

Since it is the stated goal of your bill to maintain the status quo prior to April 10, 1984, it may be possible, via explicit report language to accompany the bill, to state that the sole intent of the legislation is to maintain the status quo on the sharing and ownership of ATM's and not to address the question of deposit taking or any other issues. If that type of specific language could be crafted and included in the committee report, we would enthusiastically support the approach taken in S. 2898. We have attached a proposed version of report language in appendix A.

With respect to the Conference of State Bank Supervisors, they would, understandably, subject the shared national bank ATM's to "all pertinent State laws regarding location, ownership, operation, and permissable functions."

The imposition of such restrictions would be contrary to the basic guiding principles that our association has adopted regarding electronic terminal deployment. The CSBS approach could create 50 different sets of rules for the use of terminals. Most importantly, the CSBS amendments might be construed to give additional authority to the States to control the functions, ownership, and even the sharing of ATM's by national banks. This raises an entirely new issue that goes well beyond a simple legislative correction of the *Marine Midland* decision.

In addition to the already discussed suggestion of the ABA to resolve the problem with respect to the sharing issue, our association has also developed a second solution that might provide a less controversial fix which bypasses some of the concerns attendant to the other approaches.

We have drafted an amendment to S. 2898 which would simply provide that national banks can share or permit its customers to use automated devices at least to the same extent as State-chartered institutions where the national bank is located. An amended version of S. 2898 is attached as appendix B. To the best of our knowledge, virtually every State in the Union allows its State-chartered institutions to participate in interstate shared ATM networks. To allow national banks at least this authority would ensure their continued participation in these networks.

We, therefore, would offer this approach as an additional possible way to resolve the problem.

In conclusion, we clearly support the concept of assuring the continued viability of these shared ATM networks. We can and will support any attempt to fix the current problem which is consistent with our stated policy. An approach which seeks to specifically impose a broad array of State law constraints on the use or operation of shared ATM's would be a step backward in the evolution of banking technology and law, and is not acceptable. We welcome the opportunity to work with you, Mr. Chairman, and the other Senators and staff to fashion a legislative solution. I certainly hope, however, that the clear message that comes out of these hearings is that these networks provide a valuable, needed, and used consumer service of which consumers should not be deprived by a legal uncertainty. I think we all can agree upon that point.

Thank you, Mr. Chairman.

[The complete statement follows:]

TESTIMONY OF THE
AMERICAN BANKERS ASSOCIATION
BEFORE THE
SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS
ON
S.2898 - THE BANKING CONVENIENCE ACT OF 1984
ON

September 19, 1984

Mr. Chairman, my name is Dale Browning. I am Senior Vice President of the Colorado National Bank of Denver. I am currently serving as president of Plus System, Inc. a national shared ATM network. The Plus System, Inc. has also filed with the Committee its comments on the proposed legislation. I am here today representing the American Bankers Association. The American Bankers Association is the primary commercial banking trade association. Our members hold over 95 percent of the commercial banking assets in this country.

We welcome the opportunity to present our views on S.2898 specifically, and our general views on electronic terminal deployment and use. I think we are all aware that at issue here is the continued participation of national banks in shared ATM networks. It is imperative at the outset that we recognize the extent to which shared ATM networks have been woven into the fabric of every day life.

Bank Network News, a trade newsletter, conducts an annual survey of the top 100 shared ATM networks in the country. The first sentence of their 1984 report gives a good feel for how universal the use of these networks has become.

> "Nearly 16,000 automated teller machines or 40 percent of the 40,000 machines now installed in the United States are linked to one of almost 200 regional shared EFT networks, and each month the shared ATMs are performing an estimated 60 million transactions, one third of the nation's total ATM volume.
>
> In addition the survey discovered:
>
> - The figure of 60 million transactions a month quoted above, is a 33 percent increase over last year.
> - Approximately 7,500 banks have signed on with networks. An increase of 25 percent over last year.
> - Over 50 million ATM access cards carry the logo of a shared network, which represents over 2/3 of all debit cards in the country."

The growth in participation by financial institutions and use by customers of shared ATM networks has been phenomenal. If one message comes out of these hearings today, I hope it is that no one will benefit if these networks are put out of business.

History of Current Problems

Before we begin our discussion of the legislative proposals, let me briefly outline the events that have led us to these hearings today.

In the early 1970's, a new phenomenon appeared on the banking scene, the ATM (automated teller machine) or Customer Bank Communication Terminal (CBCT). These machines allowed bank customers unheard of banking convenience. Withdrawals, deposits, balance inquiries, advances against pre-approved credit lines could all be accomplished 24 hours a day, 7 days a week, without ever entering the bank itself.

One of the earliest questions about these devices was "What is their legal status?" "Are they branches or not?" While state regulators and state legislators, both then and now, varied widely on how they should be treated for state chartered institutions, the Comptroller of the Currency took a much more liberal view for national banks, holding that they were not branches and therefore, not subject to the branching restrictions of the McFadden Act. (The McFadden Act prohibits national banks from branching outside of the state where the bank is located). The resulting inevitable lawsuit ended with the U.S. Court of Appeals for the District of Columbia Circuit saying, in essence, that ATMs established (i.e., owned or rented) by a national bank, are branches within the McFadden Act definition. Independent Bankers Association of America v. Smith, 534 F.2d 921 (D.C. Cir. 1976). Therefore, if the national bank didn't establish the terminal, but merely used it on a transaction fee basis, it would not be considered a branch. Subsequently, regulations issued by the Comptroller of the Currency, based on the Smith decision made it clear that a terminal not owned or rented by a national bank was not a branch for McFadden Act purposes. For over eight years in reliance on the Smith decision and the Comptroller's regulations, the banking industry has invested hundreds of millions of dollars to develop and provide to consumers regional and national shared ATM networks. Earlier this year, however, a district court judge in upstate New York took a different view.

In the New York case, a local grocery store owned an ATM which was used by banks on a transaction fee basis. A local bank sued a national bank based in a different city which was using the ATM on a transaction fee basis, claiming that the ATM was a "branch" of the national bank. (New York has a "Home Office Protection Law" which prohibits "branches" of banks in the home office town of another bank if the town has a population under 50,000). The district court agreed with the allegation that even use of the ATM by the national bank's customer makes it a branch, since it provides an advantage to the national bank by virtue of the added convenience for its customers. The court took this position even in the face of an interpretation by the state regulator which indicated that under New York State law, a state chartered bank could allow its customers to use the same ATM for limited purposes and it would not be considered a "branch" in violation of the Home Office Protection Law, for that state chartered institution. The court noted in this regard,

> "Because a facility which permits a customer to make a withdrawal from a bank account must be considered a branch ... the federal bank may in fact be prohibited from fairly competing with a state bank whose customers can utilize an ATM to make withdrawals. Assuming arguendo that this opinion constituting state law is correct... it is this court's view that Congress not the Judiciary must provide the remedy." (Independent Bankers Association of New York and Canandaigua National Bank and Trust Company v. Marine Midland Bank,

N.A. and Wegmans Food Markets. (W.D. N.Y. CIV-83-1006T April 10, 1984). (Memorandum of Decision at page 11)).

While New York has subsequently acted to clarify the status of ATMs within New York for home office protection and branching purposes, the larger problem growing out of the Marine Midland case is the finding that mere use of an ATM by a national bank customer renders it a "branch" of that bank under federal law.

Prior to this decision a national bank based in Virginia that belonged to a regional or national ATM network (i.e., Most, Cashflow, Network, Cirrus, PLUS SYSTEM, etc.) could offer its customers the convenience of using ATMs all over the east coast or from coast to coast to take cash advances against a credit card, draw cash from an asset account, or make balance inquiries. If the Marine Midland case is affirmed, however, customers of the national bank located in Virginia will generally be limited to using ATMs within the state of Virginia. Interstate use of ATMs by national banks' customers will be prohibited. The irony of the situation is that similarly situated state chartered banks, federal savings and loans, and federal credit unions will not be so constrained. In fact, federal savings and loans and federal credit unions are currently authorized to deploy and use ATMs without geographic restriction. Our research indicates that every state allows its state chartered institutions to participate in these interstate networks. Therefore, the McFadden Act passed almost 50 years ago to give national banks "competitive equality" vis-a-vis state chartered banks may now have exactly the opposite effect. The net effect would substantially reduce convenience for consumers. Clearly, when courts are faced with laws which may reduce the availability of a valued service the time has come for an assessment of the constraints on electronic banking technology.

Long Term Solutions

Our Association recognizes the desirability of an expeditious solution to the potential problems of the Marine Midland case. The American Bankers Association, however, has a longstanding position on the legal status of electronic terminals, their deployment and use. It is important that we briefly outline that position so that this Committee has a better feel for why we take the positions that we do on the two proposals mentioned in your letter of invitation.

Approximately seven years ago, the policy making body of our Association, adopted a set of principles for the national deployment and use of electronic banking terminals.

The principles parallel rather closely the findings in the final report of the National Commission on Electronic Fund Transfers. That Commission was established by an act of Congress in 1974, and studied in great detail for three years the emerging payment systems alternative known as electronic funds transfer. The Commission issued a lengthy report in October of 1977. One of the major recommendations of that Commission was that off premises terminals not be regulated by the same rules that govern branches. (See EFT in the United States, the Final Report of the National Commission on Electronic Fund Transfers. October 28, 1977). The principles our Association has adopted regarding the use and deployment of terminals are:

- Since EFT terminals do not possess all of the characteristics of branches, they should not be regulated by the same rules which govern branches. Rules for off-premise deployment of terminals should be more liberal than those for branches.
- Regulation of EFT terminals with respect to deployment should be based on the services provided through the terminals. Information functions (check authorization, check verification, and check guarantee), funds transfer functions (withdrawal and debit transfers), as well as certain credit functions should not be regulated as to deployment -- in effect, national deployment should be allowed for such functions.
- Deposit taking should be allowed on a statewide basis, and across contiguous state lines where natural market areas cross contiguous state lines.
- A natural market area is defined as: the largest of (1) a Standard Metropolitan Statistical Area, or (2) a radius of 75 miles from an office of a financial institution.
- In the event of federal legislation providing for interstate deployment of deposit-taking EFT facilities, the states should have the power to nullify such legislation within three years of enactment.
- National banks should be authorized immediately to deploy terminals in the state in which they are located in accordance with laws allowing deployment by state chartered banks.

We have also drafted a proposed piece of legislation to implement these principles, which is attached to our testimony for your review.

Obviously, such a comprehensive approach to the electronic terminal issue would be the subject of lengthy hearings and debate, and does not represent a viable approach to a "quick fix" for the current problem. However, these principles do represent our goals for treatment of the electronic terminal issue, and we would find it difficult to support an interim measure which would be at odds with these goals, such as that proposed by the Conference of State Bank Supervisors. It is within that framework that we address the two proposals contained in your letter of invitation.

S.2898

The bill, as introduced by you, Senator Trible, directly and forthrightly addresses the problems created by the District Court case. Your bill would specifically allow national banks to "share or permit its customers to use" terminals not "owned or rented" by that bank. This would clearly solve the problem, and eliminate any question as to the continued legality of national bank participation in the interstate shared networks. However, enactment of this provision could raise the issue, of interstate deposit taking by national banks.

The National Bank Act does not specifically prohibit interstate deposit taking. The Act only defines "branch" for national banks as any place where checks are paid, money lent or deposits taken, and states further that national banks' branching authority finds its outside limit at the borders of the state where it is located. Under S.2898 there is no limitation on the allowable functions of the shared terminals. Thus, there is no express prohibition on the taking of deposits interstate.

To attempt to specifically prevent interstate deposit taking, poses an additional dilemma for us, since we do support limited interstate deposit taking and would not like to see a blanket contrary pronouncement by Congress.

Since it is the stated goal of your bill, to maintain the status quo prior to April 10, 1984, it may be possible, via explicit report language to accompany the bill, to state that the sole intent of the legislation is to maintain the status quo on the sharing and ownership of ATMs and not to address the question of deposit taking. If that type of specific language could be crafted, we would support the approach taken in S.2898. We have attached a proposed version of report language as Appendix A.

The Conference of State Bank Supervisors Modifications of S.2898

The Conference of State Bank Supervisors would, understandably, subject the shared national bank ATMs to "all pertinent state laws regarding location, ownership, operation and permissable functions."

The imposition of such restrictions would be contrary to the basic guiding principles that our Association has adopted regarding electronic terminal deployment. Our position grows out of a basic understanding that these terminals are not branches and should not be treated as such. Many states still consider ATMs to be branches or a form of branch and impose upon them the attendant restrictions supplied by state law. CSBS would specifically impose those restrictions on ATMs shared by national banks. This would be a giant step backwards. The CSBS approach would create 50 different sets of rules for the use of terminals. Our goal is to have just one set of rules on the deployment and use of terminals with states retaining local control of whether or not they wish to participate in interstate deposit taking. The CSBS approach is thus clearly contrary to the ABA philosophy and we could not support the proposed incorporation of state law restrictions into the rules for national bank use of electronic terminals.

ABA Approach

In addition to the already discussed approaches to this problem, our Association has developed a suggested solution which may provide a less controversial fix which bypasses some of the concerns attendant to the other approaches.

Our amendment to S.2898 would simply provide that national banks can share or permit its customers to use automated devices at least to the same extent as state chartered institutions where the national bank is located. (An amended version of S.2898 is attached as Appendix B). To the best of our knowledge, virtually every state in the union allows its state chartered institutions to participate in interstate shared ATM networks. To allow national banks at least this authority, would ensure their continued participation in these networks.

By using the authority possessed by state chartered institutions as a minimal level of authorization, it is not intended that any federal authority over national banks be abdicated to the states. That measure of authority is intended simply as a benchmark to provide a minimum level of equivalency to national banks and assure that they are not disadvantaged vis-a-vis state chartered banks in the sharing and use of automated devices. This approach would not impact state home office protection laws. It would not impact state restrictions on deployment and use of terminals, - it would leave those issues untouched. By describing the authority granted as a minimum grant, the question is left open as to whether or not, national banks could or should have more authority, and to what extent states control the abilities of national banks. These are gray areas which exist now, and which would be preserved by our amendment. In addition, adoption of this language would not independently raise the interstate deposit taking problem, thus eliminating another concern. We,,therefore, would offer this approach as an additional possible way to resolve the problem. It admittedly does not address the problem head on, however, this approach would fix the problem without raising many of the concerns attendant to the previously discussed proposals.

Conclusion

Our conclusion on this issue is very simple. We clearly support the concept of assuring the continued viability of these shared ATM networks. Our policy and goals for electronic terminal deployment and use have been outlined. We can and will support any attempt to fix the current problem which is consistent with that framework. The bill as introduced, with specific report language to address the interstate deposit taking issue is certainly an acceptable approach, as is the minimum equivalency approach which we have suggested. Both will do the job. An approach which seeks to specifically impose a broad array of state law constraints on the use or operation of shared ATMs is not consistent with our goal of national deployment and use or in many cases, with our position that these devices are not branches. Such an approach would be a step backward in the evolution of banking technology and law, and is not acceptable. We welcome the opportunity to work with you, Mr. Chairman, and the other Senators and staff to fashion a legislative solution. I certainly hope, however, that the clear message that comes out of these hearings is that these networks provide a valuable, needed and used consumer service of which consumers should not be deprived by a legal technicality. I think we all can agree on that point. I hope we can all work together to devise a solution.

Thank you, Mr. Chairman, I will be happy to answer any questions you may have.

Appendix A

Proposed Language to Accompany S.2898

In testimony before this Committee, the concern was raised that this legislation might be interpreted to address implicitly or otherwise new activities or services by national banks. It is not the intention of this legislation to address the issue of allowable activities or services by national banks beyond making clear the authority of national banks to use and share automated devices. It is also not the intent of this legislation to disrupt or alter the concept of "competitive equality" which is the cornerstone of the McFadden Act. It is the _sole_ intention of this bill to address the issue of sharing and use of automated devices by national banks and to maintain the legal status quo on that issue as it existed prior to the District Court decision of April 10, 1984. (_Independent Bankers Association of New York and Canandaigua National Bank and Trust Company v. Marine Midland Bank, N.A. and Wegmans Food Markets_. (W.D. N.Y. CIV-83-1006T April 10, 1984).

Appendix B

S.2898 - Amended as Proposed by the American Bankers Association

S.2898

To amend section 5155 of the Revised Statutes.

IN THE SENATE OF THE UNITED STATES

A BILL

To amend section 5155 of the Revised Statutes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Banking Convenience Act of 1984".

Sec. 2. Section 5155 of the Revised Statutes (12 U.S.C. 36) is amended by adding at the end thereof the following:

"(i)(1) Notwithstanding any other provision of this section or of a similar State law, a national bank may share, or permit its customers to use, an automated device at least to the same extent as state chartered institutions where the national bank is located.

"(2) For the purpose of this subsection - the term 'automated device' includes, without limitation, automated teller machines, customer bank communication terminals, point-of-sale terminals, and cash dispensing machines.".

DRAFT Electronic Funds Transfer Systems Act of 1984
5/31/84

S.

IN THE SENATE OF THE UNITED STATES

Mr. ____________ introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

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A BILL

To authorize and provide for the deployment and use of electronic funds transfer systems by financial institutions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Electronic Funds Transfer Systems Act of 1984".

Purpose and Findings

Sec. 2. (a) The purpose of this act is to regulate the interstate and foreign commerce conducted through electronic funds transfer systems, to promote competition among depository institutions, and to promote competition between depository institutions and other business enterprises providing payment systems and services, and to afford maximum consumer and user convenience in access to competing payments systems.

(b) Congress finds that state and federal restrictions on deployment of electronic funds transfer systems by commercial banks and state chartered institutions substantially impedes interstate commerce and the ability of commercial banks to compete with other depository institutions and non-depository institutions in the providing of payment and funds transfer services. Congress further finds that the public interest is best served by the removal of inappropriate restrictions on the deployment and use of electronic funds transfer systems and for providing uniform rules governing the deployment and use of electronic funds transfer systems for all federally chartered and state chartered depository institutions.

DEFINITIONS

Sec. 3. For the purposes of this Act -

(a) "deposit services" means arrangements which enable a consumer to have cash or checks and similar instruments credited to a consumer's account at a depository institution;

(b) The term "depository institution" shall include:

(1) any institution described in Section 19(b) of the Federal Reserve Act [12 U.S.C. §461(b)];

(2) any bank holding company as defined in Section 2 of the Bank Holding Company Act of 1956 as amended [12 U.S.C. §1841(a)].

(3) any association entity which is owned or controlled by institutions referred to in clauses (1) and (2) of this subsection.

(c) "Electronic funds transfer system" means any system or component of a system comprised of one or more electronic terminals together with any related access devices, communication lines, switches for routing messages, and computer processing facilities, together with the messages transmitted through such systems.

(d) "Electronic terminal" means any electronic device, other than a telephone or a device operated by an employee of a depository institution, which may be used by retail customers individual to make deposits to an account, issue instruction to make transfers between accounts, direct the making of a payment to a third party, make cash withdrawals, or otherwise debit or credit an account.

(e) "federal banking laws" means the National Bank Act, the Home Owners' Loan Act of 1933, the Federal Credit Union Act, the Federal Deposit Insurance Corporation Act, the Federal Reserve Act, title IV of the National Housing Act of 1934, the Federal Home Loan Bank Act, and all other provisions of title 12, United States Code, which pertain to the regulation or supervision of depository institutions, as amended from time to time;

(f) "natural market area" means the largest of (1) a Standard Metropolitan Statistical Area, in which the main office or branch of a depository institution is located, or

(2) any area within a circle with a radius of 75 miles with the main office or branch of a depository institution at its center.

(g) "State" means any state, territory or possession of the United States; the District of Columbia; and the Commonwealth of Puerto Rico.

DEPLOYMENT

Sec. 4. (a) Except as provided in subsection (b) of this section, a depository institution may establish, operate and/or utilize an electronic funds transfer system at any location within any State. A depository institution may establish, operate or utilize an electronic funds transfer system in any country outside the United States to the extent allowed by laws of such country.

(b) A depository institution may offer deposit services through an electronic funds transfer system, whether owned and operated by itself or by any other entity at any location outside the State in which its main office is located only if such deposit service (i) is offered within a natural market area in which a deposit taking office or branch of a depository institution is located or (ii) is offered in States that have, through legislation or rulings on a reciprocal or other basis, permitted such services to be offered by out-of-state depository institutions.

Provided however, a depository institution may not offer deposit services through an electronic funds transfer system in any State (other than the State in which its main office is located) if, on or after the enactment of this Act, such State enacts a law or certifies that the voters of such State have voted in favor of any provision which provides explicitly that such State does not want the provision of this Act to apply to the utilization of electronic funds transfer systems for deposit services by a depository institution with a main office that is not located in that State.

(c) A depository institution which owns or operates an electronic funds transfer system may perform for other entities in connection with the operation of that system any services that such entities are authorized to undertake or offer the public.

(d) An electronic funds transfer system and the components thereof and their deployment or use at any location shall not constitute a "branch" within the meaning of any of the federal banking laws nor shall their presence or use at a location other than an office of a depository institution constitute the carrying on of the business of banking by such depository institution.

(e) No agency, department, administration or board charged with supervising a depository institution may issue regulations for the establishment, operation or use of electronic funds transfer systems, except that an appropriate supervising agency may require 60 days notice of an intent to establish an electronic funds transfer system or the deployment or change in location of an electronic terminal at any point other than the main office or any branch location of the depository institution. By notice to a depository institution, an appropriate supervisory agency may enjoin the establishment of the system or terminal if the proposed establishment would substantially impair the solvency of the depository institution or the agency determines that it would be an unsafe or unsound business practice to establish such system or terminal.

(f)(1) State constitutions, statutes, laws or regulations limiting, restricting or regulating the establishment, operation or use of electronic funds transfer systems for depository institutions as authorized by subsections (a), (b), (c) of this section are expressly preempted except to the extent that such constitutions, laws, or regulations:

(i) provide procedures substantially identical to procedures authorized in subsection (e) of this section,

(ii) provide notice requirements and error resolution procedures for users of electronic funds transfer systems substantially similar to the requirements of the Electronic Funds Transfer Act (15.U.S.C. Section 1693 *et.seq.*), or

(iii) limit the authority for depository institutions to offer deposit services as allowed under subsection (b) of this section or expand authority for the offering of deposit services beyond those authorized in subsection (b) of this section.

(2) The Board of Governors of the Federal Reserve System is authorized to publish Board or staff interpretations with regard to this section. Upon its own initiative or within 120 days of the request of any depository institution, appropriate State Official or other interested party that is submitted to the Board in accordance with procedures it establishes, the Board shall issue an interpretation regarding the scope of subsection (1) of this section or its relationship to a specific provision of State or federal law, or shall make public a Board determination (accompanied by an appropriate explanation) that the question does not involve a significant question or that additional time (not to exceed 120 days) is needed to make a proper determination.

(g) No provision of the federal banking laws or constitution or laws of any State imposing any liability, penalty, or forfeiture shall apply to any act done or omitted in good faith in conformity with any interpretation under this subsection by the Board of Governors of the Federal Reserve System, notwithstanding that, after such act of ommission has occurred, such interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

Electronic Funds Transfer Systems Act of 1984
Section by Section Analysis

Section 1 - Title. The bill is entitled the "Electronic Funds Transfer Systems Act of 1984".

Section 2 - Purpose and Findings. This section sets forth the basic findings of Congress and the purposes of the Act. Purposes of the Act are listed as the need to facilitate interstate commerce, to promote competition among financial institutions, to promote competition among financial institutions and other businesses offering payment services, and to afford maximum consumer and user convenience in access to competing payment systems. The findings of Congress indicate that federal and state restrictions on deployment impede interstate commerce and the ability of commercial banks to compete. The findings indicated that Congress intends to exercise the full scope of the Commerce Clause of the Constitution in regulating deployment and use.

Section 3 - Definitions. This section defines the essential terms used in the Act.

The term "depository institution" is used in Section 4 where nationwide deployment is authorized. The term "depository institution" includes all institutions holding federally insured deposits or eligible for federal insurance, bank holding companies, an association of institutions holding federally insured deposits and subsidiaries of such institutions or bank holding companies.

The term "electronic funds transfer systems" is defined broadly to include not only electronic terminals but communication lines switches and computer processing facilities and the messages transmitted through such systems. The term "electronic terminal" is also defined. This definition excludes telephones and devices operated by employees of the depository institution such as teller-terminals. Otherwise it is defined broadly by the type of services an individual may initiate electronically including transfers, deposits, payments, cash withdrawals and other debits or credits to an account. The term is not intended to cover the sophisticated cash management systems offered by depository institutions to large corporate customers. Thus, systems covered would be those systems primarily designed to provide services to individual consumers. Although the system may also provide similar services to businesses or corporations.

Subsection (3)(e) defines the term "federal banking laws". This term is used in Section 4(g) to describe the relationship between this Act and existing law as it has been applied to electronic funds transfer systems.

The term "natural market area" is used in section 4 to describe the areas where electronic funds transfer systems may be used to accept deposits outside the home state of a depository institution's main office. The term is defined as the largest of (1) a standard metropolitan statistical area, (2) an area encompassed by a circle with a radius of 75 miles with the office of the depository institution at its center.

Section 4 - Deployment. Subsection (a) confers general authority on depository institutions including state-chartered institutions to establish and use electronic funds transfer sytems anywhere in the United States or abroad. A depository institution would be restricted in the services that could be offered through a system only by the capabilities of the system.

Subsection (b) limits the general authority given in subsection (a) by generally prohibiting depository institutions from accepting deposits through EFT terminals located outside their home state. This prohibition is subject to two exceptions: First, out-of-state deposit services may be offered in natural market areas that extend beyond state boundaries. Second, deposit service may be offered in states that have enacted legislation granting out-of-state depository institutions the right to take deposits within all or part of that state. States are given a three year period to enact legislation prohibiting out-of-state banks from offering depository services within natural market areas extending into that state. States would not be free to limit any other aspect of the authority granted by this provision.

Subsection (c) authorizes depository institutions which own or operate EFT sytems to make the systems available for use by other depository institutions, retailers, or other businesses. This legislation does not apply to any entities other than "depository institutions" and would not restrict or authorize activities of these other entities. This section would allow a depository institution to use computer capabilities or communication lines used in an electronic funds transfer system to provide payment or other services to non-depository entities or other services to depository institutions.

Subsection (d), along with subsection (f), makes clear that the geographical extent of EFT system deployment is to be governed by this bill and competition in the financial market place and not by federal or state restrictions on branching and the conduct of the banking business. In particular, the provisions of the McFadden Act will not apply to the deployment of EFT systems.

Subsection (e) describes the relationship between this Act and other federal laws that have been or may be applied to the deployment of electronic funds transfer systems. The subsection indicates that strong deference is to be given to the provisions of this bill where two provisions of law may apply to an electronic funds transfer system. This subsection also indicates that the same rules are to be applied to different types of financial institutions. Thus, for example, the Federal Home Loan Bank Board would not be able to write regulations under another provision of the federal banking laws to authorize deposit taking beyond what is authorized by this Act. Nor could they restrict deployment that is authorized under this Act.

Subsection (e) also describes the narrow rulemaking authority that supervisory agencies have regarding deployment. An agency given supervisory authority over a depository institution would have only limited ability to regulate deployment of electronic systems or terminals. A supervisory agency would be able to require notice of deployments from all or part of the institutions it is charged with regulating or of particular types of deployments if it so desired such notice. For example, the Comptroller of the Currency could require notice of an intent to deploy from national banks whose most recent examinations indicated problems. The National Credit Union Administration could require notice from any federal credit union for any deployment involving costs over a specified percentage of the credit union's capital. The supervisory agency could enjoin any deployment that threatened the safety or soundness of the institution or which would substantially impair the solvency of the institution.

Subsection (f) makes it clear that state laws constitutions or regulations on deployment are preempted by this Act. State legislatures and state supervisory agencies are limited to requiring notice of establishment and enjoining deployment that effects the safety and soundness of the depository institution. The scope of this authority is the same as the authority given to federal supervisory agencies under subsection (e). State legislatures may also prohibit deposit services by out-of-state financial institutions or expand the authority of out-of-state institutions to take deposits within that state. This subsection also makes it clear that the Electronic Funds Transfer Act, and not this bill, is to govern what consumer protection provisions, within the scope of that Act, a state may enact. For example, if the Electronic Funds Transfer Act did not preempt a state law on disclosure it would not be preempted by this Act. However, a state provision that goes beyond the scope of the Electronic Funds Transfer Act, such as a limitation of fees chargeable for a transaction, would be preempted by this Act.

The Board of Governors of the Federal Reserve System is given authority to issue Board or staff interpretations with regard to all aspects of this statute. It is contemplated that the Board of Governors would determine the proper relationship between this Act and other federal and state laws governing electronic funds transfers.

Subsection (g) provides that interpretations of the Board issued under subsection (f) are to be given great deference even after they have been charged, rescinded, or held invalid. A depository institution whose action or inaction was based, at the time it occurred, on an interpretation by the Board shall not be punished under federal or state law.

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Plus System

D Dale Browning, President

September 13, 1984

The Honorable Jake Garn
Chairman, Committee on Banking, Housing
and Urban Affairs
SD-505
Dirksen Senate Office Building
Washington, D.C. 20510

Re: S.2898, The Banking Convenience Act of 1984

Dear Senator Garn:

I am writing to urge you to support S.2898, Senator Trible's Banking Convenience Act of 1984, a bill on which your Committee has scheduled hearings for Wednesday and Thursday, September 19 and 20. As President of Plus System, Inc. ("PSI"), the most extensive shared automated teller machine ("ATM") network in the country, I am convinced that this legislation is necessary to reverse the possible effects of a recent and erroneous federal district court decision; more importantly, it is needed in order to preserve the unprecedented consumer benefits of the PLUS SYSTEM network -- electronic access to the consumer's depository account wherever he or she travels throughout the country. Perhaps more than any other interested party, Plus System, Inc. is vitally affected by this bill and the court case that spawned it: owned by 34 financial institutions, including First Security Corporation, our company has over 1,000 member financial institutions in 47 states who share -- and allow their 23 million cardholders to use -- 3,300 ATMs. Formed in 1981 for the sole purpose of developing and operating this network, PSI in this short time has enabled its member banks to offer their customers convenient, reliable, low cost, and accurate electronic access to their accounts.

These consumer benefits, developed by PSI members at a cost of tens of millions of dollars, are now threatened by the erroneous April 1984 Federal District Court decision of IBAA v. Marine Midland Bank. That court apparently held that a national bank engages in "branch banking" when its customer merely uses an ATM owned by another institution. Although the decision is squarely contrary to long-standing lower and appellate court decisions as well as Comptroller of the Currency regulations and interpretations, it introduces so much uncertainty that legislative action is warranted.

S.2898 precisely and narrowly corrects that decision by codifying the Comptroller's rules and interpretations on sharing of ATMs by national banks; proposed amendments that do more than this confuse and complicate a simple issue. With this legislation, the PLUS SYSTEM network can continue to provide efficient, reliable, and convenient account access to the 23 million cardholders of the 1,000 PSI member financial institutions. Combined with a conclusive judicial decision in Marine Midland and revised Comptroller regulations, the failure to adopt S.2898 would have devasting effects: (1) national banks, including the 400 that are PSI members, no longer could share their ATMs across states lines; (2) traveling consumers holding PLUS SYSTEM cards from national banks would be deprived of the speed, convenience, and reliability of national electronic access to their accounts; (3) the loss of national banks might so undermine PSI scale economies or reduce numbers of ATMs that the entire network may no longer be viable; (4) the competitive balance between national and state banks could be seriously undermined because national banks could not share terminals across state lines, yet there would be no similar restriction on state banks, S & Ls, or credit unions; (5) PSI members risk the loss of tens of millions of dollars that were invested in the network in reliance upon ten years of federal court decisions and Comptroller policy; (6) the uncertainty caused by Marine Midland will discourage PSI and financial institutions, particularly national banks, from investing further in shared ATMs systems and its technology, thereby depriving consumers of more efficient and convenient products and services; and (7) smaller financial institutions who are now members of PSI will be disproportionately hurt because they will lose the very benefits of a national ATM system that permit them to compete effectively against larger institutions.

PSI's position is more fully set forth in formal comments we have this day filed with the Senate Banking Committee. Thank you for your consideration.

Cordially yours,

DDale Browning

D. Dale Browning
President

DDB:ca

Senator GORTON. Mrs. Cottrell.

STATEMENT OF MARY-PAT COTTRELL, VICE PRESIDENT, CITYTRUST (BRIDGEPORT, CT), AND CHAIRMAN OF THE BOARD, ELECTRONIC FUNDS TRANSFER ASSOCIATION, ACCOMPANIED BY HENRY POLMER, ESQ., BELL, BOYD & LLOYD

[The complete statement follows:]

Mr. Chairman and members of the Committee, my name is Mary-Pat Cottrell. I am Vice President of Corporate Financial Services at CityTrust in Bridgeport, Connecticut. I am also the Chairman of the Board of Directors of the Electronic Funds Transfer Association, in which capacity I am testifying today. I am accompanied by Henry Polmer, a partner in the law firm of Bell, Boyd & Lloyd. Mr. Polmer, who was the Deputy General Counsel of the National Commission on Electronic Fund Transfers, is the General Counsel of the EFT Association.

The Electronic Funds Transfer Association was founded in 1977, just as a congressionally-created National Commission on Electronic Fund Transfers was concluding its two year study. The EFT Association was created as an ongoing forum to promote the intelligent evolution of electronic funds transfer ("EFT"), and stands today as the only national, multi-industry organization committed to addressing the broad range of issues affecting the development and implementation of automated financial services. Association members include state and national, large and small commercial banks, savings and loan associations, mutual savings banks, credit unions and various nondepository financial institutions as well as general merchandise retailers, discount merchandisers, data processors, equipment and software manufacturers, telecommunications companies and many shared EFT networks. The EFT Association's concerns span a spectrum from government affairs to the development of technical industry standards.

We are pleased to appear before this Committee to express the views of our broad-based membership with regard to a very narrow issue with extremely broad implications -- namely the shared use of EFT terminals. Our role as a forum for the EFT ideas of every commercial group usually precludes our promoting any one group's legislative proposals which may be at odds with the interests of other member groups. Diversity in the EFT Association is not merely a mixture of small institutions and large ones. Diversity to us means institutions from a multiplicity of industries that are all involved as users or suppliers of new technologies that make EFT possible. Our forte is the gathering and exchange of information and most importantly the analysis of EFT issues and their alternative solutions. When the EFT Association takes a public position, as we will today, we do so only after attempting to ensure that it represents a broad consensus of opinion within the EFT community.

Mr. Chairman, there is a very broad concensus within the EFT community today that the decision in the lawsuit filed by the Independent Bankers Association of New York State against Marine Midland Bank and Wegmans Food Markets could, if upheld by the Second Circuit Court of Appeals, represent an unmitigated disaster for the entire retail EFT industry. As you know, the district court opinion held that an automated teller machine, or ATM, that was established, owned and operated by a Wegmans Food Market and made available for use by the customers of Marine Midland Bank and many other state and national banks on a transaction fee basis, became a branch of Marine Midland even though Marine Midland neither owned nor rented the machine. If the mere use of an EFT terminal by the customers of a national bank which neither owns nor rents it renders the terminal a branch of the national bank, then such sharing across state boundaries constitutes interstate branching and thousands of national banks all across the United States have been unknowingly engaged in unlawful branch banking for a very long time by participating in the interstate sharing of ATMS. If these shared EFT systems are forced to stop operating, the enormous investment in them could practically overnight become a gigantic waste of money. Just as important, consumers nationwide would be denied the convenience and low cost of access to their bank accounts.

For these reasons, the Electronic Funds Transfer Association strongly supports immediate congressional legislation designed to deal in a straight-forward manner with the threat that the Wegman's litigation poses to the immediate and long-term existence of retail electronic funds transfer, and the Electronic Funds Transfer Association applauds Senators Trible and Humphrey for introducing S. 2898, which is a straight-forward solution -- not to the long-term problems and general inequities which exist in the financial industry -- but to the specific impending disaster posed by the Wegman's litigation. The Electronic Funds Transfer Association supports S. 2898, and we will have more to say about it later in our testimony. First, however, I would like to discuss the background and development of EFT terminal sharing to give your Committee the perspective necessary to fully understand the current crisis.

Electronic funds transfer or EFT entered into the banking lexicon in the early 1970's, when futurists were simultaneously fascinated and alarmed by predictions of the imminent transformation of America into a cashless, checkless society. The demise of dollar bills and paper checks did not occur, but the idea of additional electronic payment media has taken hold.

EFT is not a new banking function. Rather, it is a new delivery mechanism. EFT offers the ability to perform electronically the many functions of a payment system more quickly and conveniently than ever before and the means to deliver new financial products and services to meet the market demands of consumers and businesses. Although very expensive to develop, EFT technology ultimately should reduce significantly the escalating costs of providing financial services. Costs are saved when less paper flows through the system, when fewer checks go through the mails, when float is controlled or reduced, and when human labor can be directed to more productive tasks than receiving and disbursing funds.

Today's most obvious symbol of EFT is the automated teller machine or ATM. A decade ago there existed a handful of underutilized ATMs. Now consumers use ATMs to perform billions of transactions per year. There are approximately 40,000 ATMs deployed in the United States, and that number is rapidly increasing. The investment of financial institutions in ATM terminals alone exceeds one billion dollars.

At an ever increasing pace, ATM usage has been evolving into a new phase which the industry often calls "interchange." Financial institutions that own and operate ATMs have been making the use of these machines available through networks to customers of other financial institutions on a transaction fee basis. This phenomenon has reached extraordinary proportions.

Today there are as many as 200 shared regional networks of ATMs serving virtually every state and region of the United States. The 16,000 ATMs connected to shared networks process approximately 60,000,000 transactions per month, which is about one-third the total ATM transaction volume. Nearly 65 percent of the financial institutions with ATMs belong to shared ATM networks, and they have collectively issued over 50 million ATM access cards with shared network logos, representing 67 percent of all debit cards issued in the United States. Moreover, membership in shared ATM networks is common among both large and small, state- and nationally-chartered institutions. In fact, a recent survey indicates that almost 40 percent of the institutions that are now planning to begin offering ATM services for the first time plan to do so through membership in a shared system.

Although shared ATM systems involving all types of financial institutions exist in virtually every state, sharing in these systems has not been restricted by state boundaries. Eighty-four percent of the twenty-five largest regional shared ATM networks (all but four) include terminals in two or more states and often include an entire region such as New England or the mid-Atlantic states. In addition to all the regional shared ATM networks, there are seven national ATM networks which have given consumers the ability to obtain cash at ATMs nearly anywhere in the United States. By year-end 1983, these national ATM networks had nearly 10,000 ATMs on-line, meaning that approximately one-fourth of all the ATMs in the United States today may be used by customers as a travel service to obtain cash away from home.

The rapid growth of regional and national shared ATM networks is the result of many factors. Ever since initial consumer resistance to this new technology was overcome in the early and mid-1970's, ATMs have grown increasingly popular. Basically, ATMs are popular because they are convenient. A consumer can use an ATM to perform simple financial transactions whenever he wishes without going to his bank because the ATM, like a telephone, is an electronic communication device that puts him "in touch" with his bank.

By the mid 1970's financial institutions were beginning to understand that although a single ATM, like a single telephone, is a fascinating instrument, the real value in either electronic device is in its widespread deployment and ready accessibility to consumers. The value of a consumer's debit card is directly related to the number of ATMs available to him and the locations of those machines. Accordingly, financial institutions were looking for ways to expand their ATM networks.

Expansion tended to occur in two ways. First, some large institutions developed substantial proprietary ATM systems in their local areas, but when national banks tried to establish their ATMs in areas where they were not authorized to establish branches, they were met with a flurry of litigation, which culminated in 1976 with the landmark decision of Independent Bankers Association of America v. Smith, 534 F.2d 921 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976), in which these banks were told that they could not own or rent an ATM where they could not establish a branch.

However, even before the Smith decision a second form of ATM expansion -- interchange -- was beginning to take shape in states such as Wisconsin and Nebraska. This type of expansion made a great deal of sense economically because it enabled banks to expand exponentially the ATMs available to their customers without incurring the substantial costs associated with establishing each ATM. It was also the most efficient form of ATM usage because it enabled a single machine to obtain high transaction volumes which would eventually provide its owner with a return on investment. Moreover, the EFT laws of approximately half the states either expressly permitted or actually required financial institutions (state and national) to make their ATMs available for sharing upon the request of other financial institutions in the state.

In a typical ATM interchange system, each participating financial institution owns a number of proprietary ATMs which are prominently identified as its own. Each institution will have deployed those ATMs where it is authorized to deploy them. Each institution will have obtained whatever regulatory clearances are necessary and will make whatever periodic reports are required by the appropriate regulators. Each institution will operate and maintain its own ATMs. Each institution will supply the cash for its ATMs, will empty the deposits from its own ATMs and will balance its own machines. Moreover, each institution will normally be responsible for the telecommunication lines connecting its ATMs to the network.

The interchange network itself, which may be a joint venture of the participating institutions or a third-party, will provide central computer processing and transmission facilities, typically referred to as a "switch." The network usually develops operating rules to coordinate the interchange and may provide a settlement mechanism for the institutions. Because switch development and operation are very expensive, network members usually pay membership and operating fees to the network.

In a simple interchange system a customer of one financial institution has an access card that prominently displays the name of his institution and that much less prominently displays a small logo identifying the ATM network whose machines he may use. The cardholder may then use his card at any ATM displaying the network logo. When he uses a machine which is owned and operated by another institution, his institution typically pays the other institution a transaction fee and may also pay a small fee to the network to defray the cost of operating the switch.

In a more complex interchange environment a central switch may connect a number of smaller ATM networks together through their individual switches, which act as intercept processors. In this type of network the intercept processors rather than the individual financial institutions may be liable for the exchange of transaction fees when a cardholder from one primary network uses an ATM from another.

As financial institutions of all types increasingly opt for membership in multiple shared ATM systems, each institution's cardholders are finding to their apparent delight that they are able to obtain access to their accounts at hundreds and sometimes thousands of shared ATMs, each of which is usually identified primarily with the name of the institution which established it and secondarily by an increasingly large collection of network logos.

Recognizing both the economic efficiency and consumer convenience of interstate shared ATM networks, state banking regulators have reacted favorably to the concept and have, when asked, generally concluded that the use of an ATM by the customer of an out-of-state bank to withdraw funds from his out-of-state bank account is permissible under state laws.

The development of regional and national shared ATM systems has now paved the way for what is generally acknowledged to be the next step in consumer EFT -- the development of electronic point-of-sale systems. These systems, which will permit customers to obtain the discounts and other benefits of paying with cash for goods or services without actually carrying any cash, hold promise of substantial convenience for consumers and economic efficiency for banks and merchants. However, EFT at the point-of-sale is only practical if the customers of many financial institutions in regional and national market areas are able to share the use of a common electronic terminal.

The financial services industry has in many ways been productively using electronic communications and data processing in the last fifteen years for the benefit of both the institutions and the customers they serve. Shared ATM networks are not a new phenomenon. They have become an integral part of the banking system; yet they are threatened with annihilation by the reinterpretation of the McFadden Act in the Wegmans litigation.

In spite of the complexity of EFT technology and systems, the facts of the Wegman's case are simple. A grocery story in upstate New York has purchased ATMs, placed them in its stores, and made these ATMs, which the grocery owns and operates, available for use by customers of many state and federal financial institutions. One of these grocery store ATMs is located in a small town called Canandaiqua. The Canandaiqua National Bank and the Independent Bankers Association of New York State sued the grocer (Wegmans Food Markets, Inc.) and a national bank (Marine Midland Bank) whose customers were given access to the ATM. The plaintiffs argue that the ATM is Marine Midland's branch because, if it is such a branch, the shared ATM may be restricted to use by state banks or even eliminated from Canandaigua under New York laws giving "home office protection" to the Canandaigua National bank.

It seems surprising that one district court decision concerning one ATM in a Canandaigua, New York supermarket could shake the foundations of an entire nationwide industry. How could this have happened?

It results from the district court's abandonment of a standard that was set forth eight years ago by the United States Court of Appeals for the District of Columbia in its landmark decision in IBAA v. Smith. In that case the court dissected the McFadden Act, thoroughly reviewed the functions of automated teller machines, pondered the criteria which caused them to be "established and operated" by a national bank within the meaning of the McFadden Act, and developed a three-part standard that governs whether a national bank has established an ATM as its branch. According to that standard an ATM can be a branch of a national bank only if (1) it performs at least one of the traditional banking functions of receiving or disbursing funds and (2) it is owned or rented by the bank, and (3) it gives the bank a competitive advantage.

Contrary to that standard, the district court held that Wegmans' ATM was an unlawful branch office of Marine Midland despite the fact that the bank neither owns nor rents the ATM.

The McFadden Act, 12 U.S.C. § 36, does not permit national banks to establish and operate branch banks across state lines. If the mere use of an ATM by the customers of a national bank renders that ATM a branch of the customers' bank even though the ATM is established, maintained and operated by another for its own benefit and even though the ATM is shared by dozens, hundreds or even thousands of financial institutions, then thousands of national banks all across the United States have been engaged in unlawful branch banking at a staggering cost for as long as eight years by participating in shared ATM networks across state lines.

The Wegman's case, if affirmed, will impede and could even destroy the shared ATM networks which have now become an integral part of both national and state banking systems, and because of its potential to throw the entire national banking system back to a position of competitive inferiority in the field of retail banking vis-a-vis state banks, the case would fly in the face of the main thrust of the McFadden Act which was to protect the national banking system. Furthermore, it injects substantial uncertainty into the relatively new point-of-sale systems. In short, the case portends a potentially disastrous result for the entire consumer electronic funds transfer industry nationwide.

It is for this reason that the Electronic Funds Transfer Association, the Comptroller of the Currency, the Federal Reserve Board, the Consumer Bankers Association, Visa, MasterCard, a professor of law and numerous ATM interchange networks filed amicus curiae briefs with the Court of Appeals urging that court to reverse the district court. In our brief we argued that the district court erred by refusing to apply the proper standards, which were developed by the United States Court of Appeals for the District of Columbia in IBAA v. Smith in 1976. We opposed the district court's decision because it is inconsistent with the main thrust of the McFadden Act, which was to strengthen the national banking system. We explained that the district court's decision contradicts the standard which has been adopted by four circuit courts of appeal, and that it effectively strikes down national banking regulations promulgated by the Office of the Comptroller of the Currency in conformity with the IBAA v. Smith standard. Moreover, the district court's decision is irreconcilable with numerous Interpretive Letters issued by the Office of the Comptroller to advise the EFT industry in the development of shared ATM networks.

In short, we believe that the arguments advanced in our brief are compelling, and we expect the Court of Appeals to reverse the decision of the district court. But as you well know, not even those who legislate the laws can confidently predict how the courts will interpret them. In a case where so much is at stake, it would be irresponsible not to anticipate the worst and to leave the future ability of consumers to continue using broad-based ATM networks to the vagaries of a court interpreting a statute written more than fifty years ago.

The EFT industry has in good faith spent millions of dollars during the past eight years developing shared ATM networks in reliance upon the well-settled principles of the McFadden Act as interpreted by the Court of Appeals in IBAA v. Smith in 1976, and in conformity with the subsequent regulations and interpretations of the Comptroller of the Currency. It would be wasteful, disruptive, inefficient and patently unfair to change the rules of the game at this late date. We believe that the people of the United States as well as the entire EFT industry would be the losers if the Wegman's lawsuit were to shut down the EFT networks, and we believe that Congress should not and will not allow the multi-million dollar ATM interchange phenomenon to grind to a halt.

Let me now turn my attention to the Banking Convenience Act of 1984. As I indicated earlier, the Electronic Funds Transfer Association supports this bill and urges its immediate enactment. This is not to say that the Electronic Funds Transfer Association believes that this bill represents the ideal legal treatment for EFT terminals. We do not. Many of our members believe very strongly that an EFT terminal should never be classified as a branch bank under the McFadden Act and that the use and deployment of ATMs and other EFT terminals on a shared or proprietary basis should be totally deregulated.

Nonetheless, we recognize that the total deregulation of EFT terminal deployment would be a substantive change in the status quo and that change is a slow process which involves compromise by many parties. We support the Banking Convenience Act this year because we believe this bill -- which would preserve the status quo with regard to ATM sharing -- is the best short term solution to reverse the potential negative effects of the Wegmans case.

The Banking Convenience Act merely codifies into statutory law the interpretation of the McFadden Act that has been the law recognized by all parties since that Act was definitively interpreted with regard to ATMs by the Court of Appeals in IBAA v. Smith in 1976. It is also the law that is contained in the regulations of the Comptroller of the Currency. It is also the rule that has formed the basis for numerous interpretive letters from the Comptroller to national banks. In short, there is nothing new in this act. It is the way the McFadden Act has been intrepreted for the past eight years. We are not prepared to say this is the way the McFadden Act should continue to be interpreted forever. We do not believe it is. We do believe that this is the best, quickest, and least controversial way to avert the crisis that will be upon us if the district court's decision in the Wegmans case is upheld. For this reason, we heartily endorse action on this bill this year.

In your letter to us, Mr. Chairman, you asked us to react to certain changes to the bill that have been proposed. Since that time we understand that others have proposed other changes. We understand that many groups would like to see a bill that addresses their own view of how interstate banking issues should ultimately be resolved. The problem with such approaches is that they run head-long into each other. The beauty of the bill that has been proposed is that it does no more than is necessary in a time of potential crisis, but it does enough -- it preserves the status quo under which all parties have been operating.

Finally, we understand that some parties are very concerned about the preservation of so-called "home office protections" which are contained in some state banking laws. They want to be sure that if a state prohibits its state banks from using ATMs in home office protected areas, national banks will also be prohibited from using ATMs in those areas. This kind of protection may be inherently anti-competitive. Nonetheless, it is only peripheral to the potential crisis of the Wegmans litigation.

The real problem of the Wegmans litigation is that it could lead to national banks being prohibited from using any ATMs or other EFT terminals across state lines. If there are some areas in which state banks are prohibited from using EFT terminals in some states and if it would advance the progress of the Banking Convenience Act, the Electronic Funds Transfer Association would consider, for example, an amendment that indicated that for a very limited period of time national banks could not share or permit their customers to use EFT terminals in areas in which all state-chartered banks were expressly prohibited by statute from sharing or using such terminals.

Mr. Chairman, on behalf of the Electronic Funds Transfer Association I have tried to make the case for the urgent need for Congress to enact legislation now to reverse the effect of the Wegmans case. The Association appreciates the opportunity to appear before this Committee, and Mr. Polmer and I would be happy to answer any questions you may have.

Senator GORTON. Thank you, Mrs. Cottrell.
Mr. Elliott.

STATEMENT OF JOHN C. ELLIOTT, EXECUTIVE VICE PRESIDENT, MASTERCARD INTERNATIONAL, INC.

[The complete statement follows:]

Good Morning. My name is John C. Elliott. I am an Executive Vice President of MasterCard International Incorporated. MasterCard International is a membership organization whose members include the more than 13,000 U.S. financial institutions which issue and honor the well-known MasterCard cards. Our membership includes both state and federally chartered commercial banks, savings and loan associations, savings banks, and credit unions. MasterCard licenses its member financial institutions to issue both credit and debit cards bearing marks owned by MasterCard. The institutions themselves issue the cards, set the terms and conditions of the underlying credit line or deposit account, and contract directly with merchants to acquire their transaction slips.

Among the important services that MasterCard offers its members is an automated teller machine or "ATM" interchange service called MasterTeller. It is because of the MasterTeller program in particular that we strongly support S.2898, which is aptly titled the "Banking Convenience Act of 1984." By merely codifying an existing regulation of the Comptroller of the Currency, S.2898 will help assure the continued existence of the present electronic funds transfer systems, which deliver retail financial services conveniently and economically. It will also confirm the ability of national banks to compete in the retail marketplace. Most important, this bill will help guarantee for consumers the substantial conveniences of electronic banking that they have learned to enjoy.

Before discussing the details of the bill and the reasons it is needed, I would like to describe the MasterTeller program and explain why MasterTeller and other shared ATM networks have been so successful.

THE MASTERTELLER PROGRAM

The MasterTeller program enables the holder of a credit or debit card issued by a participating institution to make cash withdrawals through designated ATMs owned and operated by other participating institutions across the country. This is made possible by a central computer "switch" that connects an ATM the cardholder wishes to use, for example, in Atlanta with the cardholder's own bank, say, in Seattle. The switch, which is owned and operated by MasterCard, allows the ATM in Atlanta and the bank in Seattle to communicate electronically with each other. The ATM uses the path created by the MasterTeller switch to transmit the cardholder's card account number and withdrawal request to the cardholder's bank. The bank uses the same path to respond to the withdrawal request. The ATM dispenses the cash and the cardholder's credit line or deposit account is debited. The cardholder's bank and the institution that owns and operates the ATM settle the transaction between them at the end of the day.

Institutions may participate in the MasterTeller program by connecting one or more of their ATMs to the MasterTeller switch and by designating some or all of their MasterCard cardholders as participants. A participating institution must certify to MasterTeller that the ATMs it wishes to connect are established in accordance with all applicable laws. For national banks, which are the focus of S.2898, this means that each ATM established by a national bank must be approved by the Comptroller of the Currency as a separate customer-bank communications terminal or "CBCT" branch of that bank. Since current federal law requires the Comptroller to refer exclusively to state bank branching laws in determining where a national bank may locate its branches, a national bank's CBCT branch can be located only where a branch of a state bank in the same state could be located. State banks and other federally chartered institutions likewise must certify that they have established each of their ATMs in compliance with all applicable federal and state laws and regulations.

A participating institution with ATMs connected to the MasterTeller switch receives a transaction fee from the cardholder's institution whenever its cardholder uses another bank's ATMs connected to the switch. Every ATM connected to the MasterTeller switch is identified by the special MasterTeller logo along with the name or logo of the institution that owns and operates it. Over 252 member institutions to date are committed to participate in the MasterTeller program. By the end of this year, approximately 1,300 ATMs nationwide will be accessible to cardholders through the MasterTeller program.

THE GROWTH OF SHARED ATM NETWORKS

The growth of ATMs and shared ATM networks such as MasterTeller has been rapid. The number of ATMs in use between 1973 and 1981 grew at an annual rate of 34.78%, and the average number of monthly transactions grew during the same period from 1,000 per ATM to 6,000.[1] It has been reliably estimated that by the middle of 1983 nearly 16,000 ATMs, or 40% of the ATMs then in operation in this country, were participating in one or more shared ATM networks. There are currently several such networks operating nationwide and over 100 are operating on a regional basis. Each month these networks process approximately 60 million transactions initiated by customers of some 9,000 financial institutions. About 7,500 of these institutions are commercial banks (many of them undoubtedly national banks), representing over half of the nation's commercial banks.[2]

The impressive growth of shared ATM networks attests to their value. To consumers, shared ATM networks offer unparalleled convenience and security: their bank accounts are accessible at little or no direct cost virtually 24 hours a day, 7 days a week. Consumers can obtain cash withdrawal services at many more locations than their own institution's branches or proprietary ATMs. Consumers no longer need be concerned about carrying large amounts of cash, or shopping during banking hours or near their own bank's branches, or running out of money in an emergency far from home. Instead, shared ATM networks have made it simple and safe to obtain cash practically anywhere, anytime. Consumers have increasingly come to depend on shared networks, and they insist on the convenient services these networks provide. Shared ATM networks in short, are a major, vital, state-of-the-art component that enables our retail banking system to deliver financial services more conveniently to their consumers.

For institutions, shared ATM networks greatly enhance their ability to serve their customers and therefore to compete: through shared ATM networks, both large and small institutions can deliver financial services to their customers in a much larger market area and from many more locations than would be possible on their own. Shared networks may also mean cost savings. Participating institutions can avoid the large initial outlays necessary to establish an ATM system. At the same time, ATM-owning institutions can help defray these outlays with transaction fees collected from other institutions. All institutions alike can benefit from the economies of scale made possible by greater numbers of customers using the system. These are critical considerations, especially for smaller institutions that must provide ATM services to their customers to compete but which may be unable to afford the high capital costs of establishing and maintaining their own proprietary ATMs or which lack the expertise and programming capability to support their own systems. Without shared ATM networks, many of these institutions would be confined to small local markets and precluded from enjoying the competitive benefits and cost efficiencies of electronic banking.

Customer convenience and security, competitive benefits, and cost savings are not the only factors that have contributed to the rapid growth of shared ATM networks. Most states have helped pave the way by enacting legislation or adopting regulations which exclude ATMs from restrictive branching provisions and which expressly permit, and in some cases even mandate, ATM sharing.[3]

THE LEGAL BASIS FOR SHARED ATM NETWORKS

The McFadden Act[4] is the 57-year old federal law which, among other things, governs the location of national bank branches. The Act effectively prohibits interstate branching by national banks and permits national banks to establish branches intrastate only in those locations where the state in which a national bank is headquartered allows state bank branches to be located.

The McFadden Act was enacted not to restrict branching by national banks but to enable them to establish branches with the same degree of freedom that is enjoyed by state banks. Congress recognized in 1927 that the national banking system would be eroded and eventually destroyed unless national banks were able to compete on equal terms with their state counterparts. By enacting the McFadden Act, Congress sought to restore the competitive balance. As Representative Hooper declared in the legislative debate:

> The national banking system of the United States has grown and developed and become an integral part of our national life...It is the main objective of the McFadden bill to place national banks on something like a parity with state banks.[5]

Shared ATM networks have been developed in reliance on favorable judicial opinions interpreting the McFadden Act's application to ATMs. The leading decision was handed down in 1976 by the D.C. Circuit Court of Appeals in IBAA v. Smith.[6]

Wisely, the court in Smith refused to define an ATM as a "branch" established by a national bank within the meaning of McFadden unless that bank owns or rents the ATM. The court's interpretation was significant because it clarified that a national bank could allow its customers to use an ATM established and operated by another institution without violating the McFadden Act's limitations on the location of national bank branches. The court reasoned:

> If an ATM becomes a branch bank simply because it provides this service of advancing funds against a line of credit, on first blush one might conclude that grocery stores performing the same function also are engaged in branch banking. This conclusion, however, would be incorrect because a bank does not establish a grocery store as a place for disbursing overdraft loans any more than a bank establishes a mailbox or a telephone as a place where its customers can make deposits or communicate account transfers.[7]

Since 1976, the court's interpretation in Smith has been followed in several other Circuits.[8] Moreover, the "owned-or-rented" rule, as it is now known, has been codified in a regulation by the Comptroller[9] and reinforced in numerous interpretive letters issued by the Comptroller's Chief Counsel.[10] In reliance on these court decisions and on the Comptroller's regulation and interpretations, many millions of dollars have been invested by financial institutions in developing the shared ATM networks we have described.

THE MARINE MIDLAND CASE

Notwithstanding the well-established body of law on this subject for the last 8 years, a recent decision of a federal district court in upstate New York has cast serious doubt on the judicial precedents and the regulatory policies which have been relied upon in the development of shared ATM networks. As a result, the legal integrity and economic viability of shared ATM networks are suddenly threatened, and the ability of consumers to enjoy ATM services as they presently exist as well as the massive private investment in these networks, is at serious risk.

The case, Independent Bankers Association of New York State, Inc., et al. v. Marine Midland Bank, N.A., et al.,[11] involved an ATM owned by and located in a supermarket in Canandaigua, New York. The ATM was shared by customers of financial institutions, including Marine Midland Bank, as part of a shared ATM network called HarMoney. The U.S. District Court for the Western District of New York misread the judicial precedents and disregarded the Comptroller's regulation by ruling that, under the McFadden Act, the supermarket ATM was a "branch" of Marine Midland, a national bank, merely because Marine's customers could use it. In this case, a "branch" of a national bank would be subject under the McFadden Act, to New York branching laws concerning the location of state bank branches.[12] New York is a "home office protection" state;

that is, it bars state bank branches from any municipality with a population of 50,000 or less in which another bank's home office is located. Canandaigua, New York, falls within the population parameters of home office protection and is the headquarters of Canandaigua National Bank and Trust Company. Accordingly, the District Court held that use of the supermarket ATM by Marine's customer constituted illegal branching by Marine Midland under the McFadden Act.

The implications of the Marine Midland decision reach far beyond a single ATM in a supermarket in upstate New York. The District Court's decision is critical because it may effectively prohibit national bank participation in interstate shared ATM networks and severely restrict participation in intrastate shared ATM networks. If the ruling in Marine Midland is allowed to stand and is followed by other courts, national bank participation in many existing networks may cease to be legal. Use by a national bank's customers of ATMs outside the bank's home state may be halted, as may the use of any in-state ATM located where a state bank branch would be prohibited under state law.

The immediate result of the Marine Midland decision is to place national banks at a serious competitive disadvantage in relation to some state banks, other federally chartered institutions, some other state-chartered institutions, and last but very important, many unregulated financial services providers.

The laws in many states permit state banks to establish and share ATMs without regard to branching provisions and restrictions. By contrast, if a national bank is deemed to be engaging in illegal branching merely by sharing the ATMs in a shared network, then its ability to compete with other institutions not affected by the ruling will be seriously hampered. The customers of such other participating institutions will continue to be permitted to use the ATM. The national bank's customers will have to be notified that shared ATM service is being discontinued. The million of customers of national banks will suffer enormous inconvenience because financial services they currently enjoy through ATMs will be unavailable to them or, if at all available, provided at far fewer locations. If they want such services, they will seek them at other institutions.

The resulting consequences for existing shared ATM networks will be dire. National bank participation is a lynchpin in many shared networks. National banks often have large customer bases. Their participation helps to increase the volume of network transactions, thereby keeping costs per transaction low. Without the participation of national bank customers, network costs for remaining participating institutions may soar and some networks may be forced to disband. Thus, even the customers of other institutions may be adversely affected, because the infrastructure of many shared networks will be weakened by the preclusion of national banks.

For the reasons we have been describing, MasterCard, along with the Comptroller and many other parties interested in the Marine Midland case, have filed amicus curiae briefs in support of Marine Midland's appeal of the decision. A copy of our brief is attached to this testimony.

S.2898, THE BANKING CONVENIENCE ACT OF 1984

S.2898, the "Banking Convenience Act of 1984," would resolve the confusion created by the Marine Midland decision by merely codifying the "owned-or-rented" rule that was adopted by the Comptroller on the basis of the Smith decision, which has been relied upon in the development of shared ATM networks these past years. S.2898 would authorize a national bank to allow its customers to use any "automated device" that is not established by the bank. No such device would be deemed a "branch" established by the bank under the McFadden Act as long as the bank does not own or rent it. The bill would preempt any other federal or state law to the contrary, and make clear that transaction fees, access charges, and similar components of the price that a bank may pay to share an ATM network do not constitute "rent" that would make its customers' use a branching activity.

S.2898 is simple, rational, and fair. It is simple because the test of whether or not an ATM is a branch of a national bank would turn on whether that bank owns or rents the device. Ownership or rental in the context of ATMs is a clear standard which national banks and the Comptroller have been familiar with since the Smith decision in 1976.

The bill is rational because ownership or rental clearly distinguishes the degree of responsibility and control an institution possesses over an ATM. If a national bank owns or rents an ATM, it has selected the site and the hardware, and it has supervised the installation. It operates the ATM on a day-to-day basis and, most important for the purpose of the McFadden Act, the bank uses the ATM to its own marketing advantage to build and service its own base of customers, who will use the ATM regularly. It is logical under such circumstances to consider the ATM a "branch" requiring the Comptroller's approval. On the other hand, if the bank neither owns nor rents the ATM, it has little or no authority over site, hardware, installation, or daily operation, and cannot employ the ATM as a proprietary component in its marketing strategy. Its customers may seldom, if ever, use any particular shared ATM. Under these circumstances, it is simply not sensible to treat the shared ATM as a "branch" fully comparable to the bank's other brick-and-mortar branches or proprietary ATMs.

S.2898 is fair because it distinguishes banking services regularly offered by an institution to its customers through its own facilities from services occasionally provided through a correspondent institution's facilities. This is a time-honored distinction. The provision of traditional correspondent services such as check cashing or letters of credit, for example, has never been deemed to convert the correspondent bank or other facility at which such services are performed into a "branch" of the bank whose customer may be occasionally served there. To illustrate, a letter of credit simply requests one party to make advances to a third party on the credit of the signatory of the letter. Through the use of these letters, banks and their correspondents substitute their own credit for that of firms, corporations, or individuals toward a common goal of safely, economically, and expeditiously conducting domestic and foreign transactions. Thus, as between members of a shared ATM network, a bank issuing a letter requests a correspondent bank to make advances to its customer on the strength of the contractual relationship of the two institutions. Chaos would result if every correspondent bank or other facility at which such correspondent services were performed, were deemed a branch of every bank whose customers received services there, since every banking facility would have to be subjected to the rigorous branching rules for every bank whose customers received correspondent services at that location.

The explosive growth of electronic banking against the backdrop of a federal law enacted in 1927 is raising many complicated new issues. Some of these are raised by the amendments to S.2898 proposed by the Conference of State Bank

Supervisors. Basically, the Conference's proposal would condition the sharing of ATMs by national banks on compliance with "all pertinent state laws." This proposal is troublesome, particularly at this juncture, because the nature and extent of any authority the states may have over national bank activities is far from clear. Indeed, it is a complex and extremely significant question that will require major policy judgments involving jurisdiction, parity and the future of the dual banking system. These judgments should be made only after policymakers have had an opportunity to engage in extensive study and informed discussion with all the parties affected.

By comparison, the question raised by the Marine Midland decision is a narrow one, but it is of great urgency to national banks and their customers as well as to the shared ATM networks whose advantages and conveniences they enjoy. S.2898 deals, as it should, exclusively with this limited though critical question. It seeks only to reinstate the status quo on which there has been so much reliance. In doing this, the bill properly leaves the more complex issues to be decided at a later date in the context of broader banking industry concerns.

THE NEED FOR PROMPT CONGRESSIONAL ACTION

Congress must act promptly to remove the doubts created by the Marine Midland decision. The decision endangers the existence and future of shared networks and the services they provide consumers. Unless Congress acts, national bank customers may no longer be able to use any ATM located outside the bank's home state because the McFadden Act does not permit interstate branching. Furthermore, access to in-state ATMs by national bank customers might be severely limited in many states. Many states restrict state bank branches to certain locations, and by reference the McFadden Act limits national bank branches to the same locations. However, the laws in many of these states do not treat ATMs established by state banks as branches or ATM sharing as restricted branching activity. Therefore, unless Congress clarifies the definition of a national bank "branch" to include only an ATM that is owned or rented by a national bank, national bank customers may be unable to use many ATMs available to customers of other participating institutions. In addition, if Congress fails to act, every ATM merely being shared by a national bank's customers may be subject to both the Comptroller's approval and stiff capital requirements.

The Marine Midland decision also contradicts the spirit and intent of the McFadden Act, whose original and continuing purpose is to promote competitive equality between national and state banks. Because this was and remains sound, important and rational policy, Congress should act quickly to ensure that the decision in Marine Midland does not undermine it.

Prompt congressional action is also needed because the appeal in Marine Midland will take time. The current, best estimate is that the Second Circuit Court of Appeals will render its decision no earlier than next year. If the Second Circuit's decision is appealed, a final decision could be years away. Meanwhile, the legal uncertainties raised by the District Court's decision will at least chill further involvement of national banks in ATM sharing and retard development of shared systems that would still better serve consumers.

Equally important, a final decision in the Marine Midland case may not definitively resolve the issue of whether an ATM shared by a national bank is a "branch" under the McFadden Act. A final decision that is too strictly confined to the facts of the case or which rests on some basis unrelated to the owned-or-rented rule may leave as much confusion as exists today.

For the reasons we have been discussing, MasterCard urges Congress to enact this legislation promptly.

On behalf of MasterCard International, I wish to thank Senator Trible, the sponsor of S.2898, for his special interest in this issue as well as the Committee for the opportunity to express our views. I will be pleased to answer any questions you may have at this time. We will also be pleased to assist the Committee and its staff in any further matters following these hearings. Thank you.

FOOTNOTES

1. Effects of Information Technology on Financial Services Systems (Washington, D.C.: U.S. Congress, Office of Technology Assessment, OTA-CIT-202, September 1984) at 118.

2. Felgan, "Shared ATM Networks: Market Structure and Public Policy," New England Economic Review, Jan./Feb. 1984.

3. See attached state-by-state survey of ATM interchange laws.

4. 12 U.S.C. §36.

5. 68 Cong. Rec. 2171 (1927).

6. 534 F.2d 921 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976).

7. 534 F.2d at 947 n. 98.

8. See, e.g., State Bank of Fargo v. Merchants National Bank and Trust Company, 593 F.2d 341 (8th Cir. 1979); State of Illinois ex rel. Lignous v. Continental Illinois National Bank and Trust Co., 536 F.2d 176 (7th Cir.), cert. denied, 429 U.S. 871 (1976); and State of Colorado ex rel. State Banking Board v. First National Bank of Fort Collins, 540 F.2d 497 (10th Cir. 1976), cert. denied, 429 U.S. 1091 (1977).

9. 12 C.F.R. §5.31.

10. See, e.g., letter from Richard V. Fitzgerald, Letter No. 160, [1981-82 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶85, 241 (1980); letter of July 7, 1980, from John E. Shockey [1981-82 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶85,241 1980); letter of July 7, 1980, from John E. Shockey [1981-82 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶85,234 (1980); letter of October 18, 1979, from Richard V. Fitzgerald [1981-82 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶85,208 (1979); letter of October 19, 1977, from John E. Shockey [1977-78 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶85,050 (1977); and letter of October 3, 1977, from Richard V. Fitzgerald [1977-78 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶85,060 (1977).

11. No. 83-1006T, slip op. (W.D.N.Y. April 6, 1984).

12. New York Banking Law §105.

84-7424,48

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

INDEPENDENT BANKERS ASSOCIATION OF
NEW YORK STATE, INC.,
THE CANANDAIGUA NATIONAL BANK AND
TRUST COMPANY,

Plaintiffs-Appellees,
Cross-Appellants,

v.

MARINE MIDLAND BANK, N.A.,
WEGMAN'S FOOD MARKETS, INC.,

Defendants,

MARINE MIDLAND BANK, N.A.,

Defendant-Appellant,
Cross-Appellee,

WEGMAN'S FOOD MARKETS, INC.,

Defendant-Cross-Appellee

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE MASTERCARD INTERNATIONAL INC.

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UNITED STATES COURT OF APPEALS

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INDEPENDENT BANKERS ASSOCIATION OF
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WEGMAN'S FOOD MARKETS, INC.,

Defendants,

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Cross-Appellee,

WEGMAN'S FOOD MARKETS, INC.,

Defendant-Cross-Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE MASTERCARD INTERNATIONAL INC.

This brief amicus curiae is filed on behalf of MasterCard International Inc. ("MasterCard") in order to assist the Court in its consideration of the issues raised in the above appeal. MasterCard submits that the United States District Court's judgment and order should be reversed.

Statement of Issues and Statement of the Case

MasterCard refers the Court to the brief of Marine Midland Bank, N.A. for the Statement of Issues and Statement of the Case.

Preliminary Statement

This is an appeal from the District Court's judgment and order enjoining Marine Midland Bank, N.A. ("Marine") from allowing its customers to use an automated teller machine ("ATM"), owned by Wegman's Food Markets, Inc. ("Wegman's"), to make deposits, withdrawals or cash advances from their Marine accounts. The District Court ruled that the ATM was a branch of Marine under Section 36 of the National Banking Act, 12 U.S.C. § 36 (the "McFadden Act"). The ATM had been established as part of a chain of ATMs at shopping center locations selected and owned by Wegman's.[1] The ATM was available for use by the customers of banks other than Marine. In fact, other banks (including a New York state-chartered bank) had made arrangements to use it through their participation in one of two ATM networks.[2]

In its opinion, the District Court committed reversible error by failing to follow the established legal test for determining the McFadden Act's application to ATMs. *See, e.g., Independent Bankers Ass'n of America v. Smith* ("*IBAA*"), 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976). In *IBAA*, the District of Columbia Circuit interpreted the McFadden Act to contain a three-part test for determining when an ATM is a "branch". Under that test, an ATM is deemed a branch of a national bank if (i) the ATM provides certain banking services identified in the McFadden Act, (ii) the ATM is established ("owned-or-rented") by the national bank and (iii) it provides that national bank a competitive advantage not available to other banks. This test has also been codified in a regulation issued by the Comptroller of the Currency. *See* 12 C.F.R. § 5.31. In its decision below, the District Court failed to apply the latter two elements of this three-part definition.

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[1] *See* Affidavit of Mark Kindig in Support of Defendant Wegman's Food Markets, Inc. at ¶¶ 2, 4, Joint Appendix at 122.

[2] *See* Affidavit of Mark A. Zalewski in Support of Cross-Motion for Summary Judgment at ¶ 11, Joint Appendix at 117; Affidavit of Mark Kindig in Support of Defendant Wegman's Food Markets, Inc. at ¶¶ 2, 4, Joint Appendix at 122. Indeed, the appellee Canandaigua National Bank and Trust Company could have used the Wegman's ATM if it wished. *Id.*

The District Court's ruling is a broadly written one that would have an impact far beyond the particular facts considered by the Court. It raises substantial questions about the status of shared ATM networks that have been organized in reliance upon the existing three-part definition of branch. These ATM networks typically consist of ATMs which have each been established (and approved by the relevant government authority) as a branch of one bank, but are also available for use by customers of other banks on a transaction fee basis. These ATMs have not been considered branches of the national banks whose customers use them on a transaction fee basis. If these ATMs are suddenly considered—under the District Court's opinion below—to be branches of every national bank whose customers use them, national banks would be severely limited in their ability to continue to participate in ATM networks. More specifically:

> (1) Because the McFadden Act prohibits national banks from having interstate branches, national banks would be prohibited from participating in existing national and regional ATM networks on any interstate basis.
>
> (2) Because the McFadden Act permits national banks to have intrastate branches only as permitted by state law, national banks would be restricted from participating in even statewide ATM networks in certain states. Many states either prohibit or geographically restrict branching, even though they do not treat an ATM as a branch of a state bank.

(3) Because the McFadden Act establishes separate capital requirements for each national bank branch, national banks might be severely limited in the number of ATMs that they could use, even when those ATMs are shared with other banks.

If the District Court's opinion is affirmed, the above consequences would place national banks at a substantial disadvantage in their ability to compete with state banks in providing convenient services to customers. This result would contradict the McFadden Act's basic purpose of promoting competitive equality between national and state banks. As a matter of policy, it also makes no sense to treat an ATM which the customers of several banks use and which is *not* subject to Marine's exclusive ownership, control or benefit as a branch of Marine.

MasterCard Has A Substantial Interest In This Appeal

MasterCard is a membership corporation that currently has over 14,000 U.S. members, including national and state chartered banks, savings and loan associations, savings banks and credit unions. The MasterCard trademark is owned by MasterCard and licensed to MasterCard members, who issue MasterCard® credit and debit cards and MasterCard II® debit cards (the "MasterCard cards") to their customers.[3] MasterCard also provides marketing and other services to its members.

MasterCard offers a program called MasterTeller by which its members can link ATMs that they each have previously and independently established. To date, national banks have been able to participate in the MasterTeller program because, under existing law, their shared-use of an ATM has not been deemed a branch activity subject to the McFadden Act. If affirmed, the

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[3] The MasterCard® credit card provides customers access to a line of credit established by their individual banks. The MasterCard® and MasterCard II® debit cards provide customers access to their checking, savings and other asset accounts at individual financial institutions.

District Court's opinion would reinterpret the McFadden Act and might limit the ability of national banks to participate in the MasterTeller program and in other ATM networks.[4]

MasterTeller is an electronic computer-based interchange program that promotes customer convenience by permitting the customer of one MasterCard member to use an ATM that is owned and operated by another MasterCard member. MasterTeller is a shared ATM program — that is, the ATMs owned by one participating bank are available for use by the customers of other participating banks.

The MasterTeller program is based upon computer switches that electronically link the ATMs of participating banks. MasterCard owns these computer switches. However, MasterCard does not have a possessory interest or control over any of the participating ATMs. Each ATM is owned-or-rented by a single bank participating in the MasterTeller program. That bank selects the ATM site, obtains any necessary governmental approvals for the ATM (including any approvals required under the McFadden Act), purchases or rents the site and the ATM hardware, advertises the ATM as its own facility and supervises the daily operation of the ATM. Under its agreement with MasterCard, that bank continues to have the full responsibility for its ATM's compliance with any applicable law, including the McFadden Act.

By contrast, other banks participating in the MasterTeller program have no authority or control over the ATMs that they do not actually own or rent. Those banks have not selected the sites of or established the ATMs and do not supervise their operations. Those banks are not identified by any advertising for these ATMs.[5] Those banks' customers might make only a single or occasional use of some of these ATMs.

Through the MasterTeller program, a customer of any participating bank can use his MasterCard card (or, in some instances, a "proprietary card" issued by that customer's bank in its own name) to withdraw cash through any participating ATM. MasterCard's computer switches transmit the necessary information from the ATM to the customer's own bank.[6] MasterCard processes only cash-withdrawal transactions.

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[4] *See* discussion at pages 18 through 20 below.

[5] The MasterTeller program's logo, however, is displayed at these ATMs.

MasterCard members may participate in the MasterTeller program in various ways. Members can participate by making one or more of their own ATMs available in the MasterTeller program for use by cardholders of any bank participating in the MasterTeller program. MasterCard members can also participate by issuing to their customers MasterCard cards or other authorized proprietary cards that provide their customers access to ATMs participating in the MasterTeller program.

Any MasterCard member — whether a national or state financial institution — may participate in the MasterTeller program. To date, approximately 216 MasterCard members have agreed to participate. Of these, one-half are national banks, and the remainder are state banks, savings and loan associations and credit unions. A total of approximately 1,300 ATMs are committed to be linked to the MasterTeller program by the end of 1984.

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[6] A cash-withdrawal transaction takes place by the following steps:

(1) Using an appropriate card and an identification code, a customer gives an ATM instructions to withdraw cash from his account. That ATM may have been established by the customer's own bank or by any other financial institution participating in the MasterTeller program.

(2) The customer's instructions are electronically transmitted — first, to a computer of the bank that owns the ATM; then, to MasterCard's computer switch; then to the customer's own bank, which verifies the customer's identification and authorizes the withdrawal.

(3) The customer's bank electronically transmits its verification and authorization — first to MasterCard's computer switch; then to the computer of the bank that owns the ATM; and finally to the ATM.

(4) The ATM dispenses cash and a receipt to the customer. The entire transaction is completed in less than 15 seconds.

(5) By means of MasterCard's computer switches, subsequent steps are taken to clear and settle the withdrawal transaction in the accounts of the customer's specific bank.

I. THE COURT BELOW ERRED BY REJECTING TWO BASIC ELEMENTS OF THE DEFINITION OF BRANCH

The District Court failed to apply two elements of the three-part test[7] that has been used by federal courts and the Comptroller of the Currency (the "Comptroller")[8] to determine what is a branch under the McFadden Act. Consequently, the Court issued an opinion with the result—clearly wrong under the McFadden Act—that an ATM could be deemed a branch of a national bank even though it is *not* established, operated, owned, rented, or exclusively used by that bank.

A. The McFadden Act

The McFadden Act was enacted in 1927 to permit national banks to establish branches for the first time. At that time state banks had a substantial advantage over national banks in competing for banking customers, because state banks had already been permitted by state law to create branches to provide more conveniently located services. Indeed, by 1927, Congress was concerned that the national banking system was weakening because national banks were converting to state-chartered banks in order to obtain branching authority under existing state law.

Thus the McFadden Act was clearly enacted to strengthen and modernize national banks. This purpose is reflected in statements by its principal sponsor, Congressman McFadden.

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[7] As previously noted, under that test, an ATM is deemed a branch if (i) it provides certain banking services identified in the McFadden Act, (ii) it is established ("owned - or - rented") by the national bank of which it is deemed a branch and (iii) it provides that national bank a competitive advantage not available to other banks.

[8] The Comptroller of the Currency is the federal official with responsibility for the administration of certain of the federal banking laws. The Comptroller, for example, is responsible for the chartering of national banks under the National Bank Act. He is also responsible for the interpretation and enforcement of the branching provisions of the McFadden Act.

Congressman McFadden explained at the time of the McFadden Act's enactment that:

> As a result of the passage of this Act, the National Bank Act has been so amended that national banks are able to meet the needs of modern industry and commerce and competitive equality has been established among member banks of the Federal Reserve System. This action was necessary; otherwise national banks were sure to seek the greater advantage offered by state banking laws, and in that event the Federal Reserve System without the compulsory support of national banks would be only a theory, not a reality as it is now assured.
>
> It will not be necessary for national banks to leave the national system now in order to meet the needs of the modern business world.

68 Cong. Rec. 5815 (1927).

In 1927, proposals to authorize national bank branches were opposed by state banking institutions and others. In its enacted form, the McFadden Act provided a compromise by permitting national banks to branch only to the extent that state banks had branching authority under state law. This compromise, as the Supreme Court has acknowledged, was intended to create a "competitive equality" in which national and state banks had equal opportunity to provide convenient services and thereby compete for potential customers. *See First National Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966), *reh. denied*, 385 U.S. 1032 (1967); *First National Bank v. Dickinson*, 396 U.S. 122, 131 (1969).

As enacted, the McFadden Act authorized national bank branches in the following manner:

First, the McFadden Act authorizes national banks to establish branches in the state in which their main office is located. 12 U.S.C. § 36(c). This provision contains *no* authority for a national bank to establish interstate branches, and has been generally interpreted to contain a prohibition against interstate banking.

Second, the McFadden Act only permits a national bank to have intrastate branches to the extent that the relevant state law authorizes branching by state banks. 12 U.S.C. § 36(c).

Third, the McFadden Act subjects each national bank branch to the minimum capital requirement otherwise applicable to the establishment of a national bank. 12 U.S.C. § 36(d).[9]

Finally, the McFadden Act requires national banks to obtain the approval of the Comptroller before establishing any branch. 12 U.S.C. § 36(e).[10]

B. The Three-Part Definition of Branch

On the basis of its legislative history and its express provisions, the McFadden Act has been interpreted to contain a three-part test to determine its applicability to ATMs. First, this test requires that a facility perform "traditional bank functions" identified in Section 36(f) of the Act.[11] Second, this test requires that a branch be "established (i.e. owned-or-rented)" by a national bank.[12] Finally, this test requires that the facility provide a competitive advantage to the national bank that is not available to other banks.

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[9] As amended by the McFadden Act, the National Bank Act requires that a national bank (located in a community of more than 50,000 persons) have paid-in capital of at least $200,000 for its main office and an equal amount for each branch. 12 U.S.C. § 51. In practice, however, the Comptroller of the Currency has raised to $1,000,000 the minimal capital that is required — at least for new national bank main offices. The McFadden Act also subjects national bank branches to whatever additional capital requirements might exist under state law. 12 U.S.C. § 36.

[10] When the McFadden Act was first enacted, Congressman McFadden explained the Comptroller's role under the Act as follows:

> The power to determine whether any national bank shall have a branch or branches is vested in the Comptroller of the Currency, so that all applications for new branches will have to be submitted to and approved by the Comptroller of the Currency before they can begin to operate.

68 Cong.Rec. 5816 (1927).

[11] Section 36(f) refers to facilities "at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f).

C. The Court Erred by Rejecting the "Owned-or-Rented" Criterion

In the opinion below, the District Court refused to apply the owned-or-rented criterion[13] and described it as Marine's attempt "to carve an exception out of the holding of [IBAA v.] Smith." To the contrary, this criterion was specifically articulated in *IBAA* and has been consistently followed by other courts and by the Comptroller. The District Court erred in not applying it.

The owned-or-rented criterion was first set forth in *IBAA*. In that case, the District of Columbia Circuit invalidated a Comptroller's interpretive ruling that had provided that ATMs were not branches under the McFadden Act, even if owned and exclusively used by one national bank. The Court interpreted the McFadden Act to contain a specific three-part test to determine if an ATM was a branch of a national bank. The Court concluded that:

> any facility that performs the traditional bank functions of receiving or disbursing funds is a branch of a national bank within the meaning of Section 36(f) if (1) the fa-

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[12] This requirement results from the language in Section 36(c) of the McFadden Act authorizing national banks "to establish and operate" new branches. 12 U.S.C. § 36(c).

[13] The District Court paid lip service to IBAA's "owned or rented" criterion only by noting, in a footnote, that "Marine pays a fee per transaction for the use of the Wegman's ATM machine" and that this fee was " 'rent' of sorts." CIV-83-1006T, slip op. at 17n.2. However, that transaction fee clearly gave Marine no possessory interest in the ATM within the meaning of Section 36. Further, as noted in the text at pages 12 through 13, the Comptroller has issued a regulation and his Chief Counsel has issued interpretive rulings that expressly provide that a transaction fee use of an ATM is not a branch activity.

> cility is established (i.e. owned or rented) by the national bank, and (2) it offers the bank's customers a convenience that gives the bank a competitive advantage over other banks (national or state) that do not operate similar facilities.

534 F.2d at 951-52.

The Court in *IBAA* set forth the "owned-or-rented" rule as the minimum control or interest that a national bank must have before an ATM would be considered its branch. In *IBAA* the Court specifically explained that the Act did not apply to facilities not owned or rented by a national bank. On that basis the Court distinguished banking-by-mail and banking-by-telephone services because:

> no place or facility established (i.e. owned or rented) by a bank is involved. Mailboxes and telephones are not facilities supplied by banks for the added convenience of their customers and designed to retain and attract patronage.

534 F.2d at 941. The Court also distinguished a grocery store check-cashing service, as a service established by the grocery store rather than by a national bank. 534 F.2d at 946 n.98.

The *IBAA* opinion has been acknowledged by several other federal Courts of Appeals as the principal and definitive articulation of the status of an ATM under the McFadden Act. *See, e.g., State of Illinois ex rel. Lignous v. Continental Illinois National Bank and Trust Co.*, 536 F.2d 176, 177-178 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); *State of Colorado ex rel. State Banking Board v. First National Bank*, 540 F.2d 497, 499 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977); *State Bank of Fargo v. Merchants National Bank and Trust Company*, 593 F.2d 341, 344 (8th Cir. 1979).

After the *IBAA* ruling, the Comptroller of the Currency promulgated a regulation to codify the owned-or-rented criterion.

See 12 C.F.R. § 5.31. That regulation defined a "CBCT branch"[14] to be "an automated device, established (*i.e.*, owned-or-rented) by a national bank. . . ."

Interpretive letters issued by the Comptroller's Chief Counsel have relied upon the "owned-or-rented" rule to conclude that an ATM is *not* a branch of a national bank that only uses it on a "transaction fee basis."[15] In these transaction-fee cases, the bank is only purchasing an electronic service and has no possessory or ownership interest in or control over any ATM. For example, in one ruling,[16] the Chief Counsel concluded:

> If . . . the accessing national banks only pay for the performance of bank services rather than for a possessory or ownership interest in the particular facility, the CBCT would not seem to be a branch bank as understood by the court. A transactional fee is not the substantive equivalent of rent. The term "rent" used in context with its companion term "own" connotes payment for an interest in real or personal property, not payment for the performance of electronic bank services. For example, a bank does not pay for the services provided by a brick and mortar branch, it pays for the right to take possession of and use that building as bank premises. On the other hand, the payment of transactional fees . . . creates no such ownership or possessory interest in the machine for the accessing bank. Only the right to receive certain electronic services is vested in the bank. Accordingly, it is

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[14] A "CBCT" or a Customer-Bank Communication Terminal is a generally used synonym for ATM.

[15] The Comptroller's regulation also provides that an ATM merely used by a national bank on a transaction-fee basis is not a branch of that bank. 12 C.F.R. § 5.31(g)(4).

[16] Letter of April 25, 1977 from Richard V. Fitzgerald. A copy of this unpublished interpretive letter is set forth in the Addendum to this brief. *See also* Letter from Richard V. Fitzgerald, Letter No. 160, [1981-1982 Transfer Binder] Fed. Banking Law Rep. (CCH) ¶ 85,241.

> clear that the facilities in question will not be "established" (*i.e.*, owned-or-rented) by the affiliated national bank[s].

The Comptroller's Chief Counsel has permitted national banks to use ATMs on a transaction-fee basis even when the ATMs are located in different states,[17] a result that would not be permissible if the ATMs had been deemed to be branches of the national bank.[18]

The Federal Reserve Board also has implicitly acknowledged the owned-or-rented rule. Under Section 4(c)(8) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.*, the Federal Reserve Board must approve a bank holding company's engaging in non-banking activities. The Board must consider, among other things, whether the proposed non-banking activities would violate any federal or state law.[19] In this context, the Board has considered proposals by bank holding companies to use computer switches to provide data processing services to ATM networks. Each proposal contemplated ATMs that were not owned-or-rented by the bank holding companies. In each case, the Federal Reserve Board approved the proposal, and concluded that the proposal raised no branching issue under state or Federal law. ***See Centerre Bancorp.***, 69 Fed. Res. Bull. 643 (1983); ***Atlantic Bancorp.***, 69 Fed. Res. Bull. 639 (1983); ***Interstate Financial Corp.***, 69 Fed. Res. Bull. 639 (1983).

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[17] Letter of July 7, 1980 from John E. Shockey, [1981-82 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,234 (1980).

[18] As previously noted, national banks are not authorized to establish interstate branches. 12 U.S.C. § 36(c).

[19] *See Gravois Bank v. Board of Governors*, 478 F.2d 546 (8th Cir. 1973); *Whitney National Bank v. Bank of New Orleans*, 323 F.2d 290 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965).

D. The Owned-or-Rented Criterion Is a Rational and Traditional Means of Distinguishing Between Branching and Non-Branching Activities

In rejecting the owned-or-rented criterion, the District Court referred to it as a "distinction without a difference." In fact, however, the distinction is a totally rational one. It is also consistent with other correspondent banking services that have traditionally not been considered branching activities.

The owned-or-rented criterion reflects a rational distinction for purposes of determining when an ATM should be deemed a branch. This distinction can be illustrated as follows. When a national bank owns or rents an ATM, it has actual control over that ATM's operations. The bank selects the ATM site and the specific ATM hardware. The bank generally advertises the ATM, by use of its own name, logos and promotional materials, as a convenience available to customers of the bank. It obtains the Comptroller's approval of the ATM as the bank's branch under the McFadden Act and otherwise complies with applicable law. Finally, the bank supervises and operates the ATM on a daily basis.

By contrast, a national bank that participates in a shared ATM network has no such control or authority over the ATMs that it does not own or rent. That bank has not selected the ATM site and, indeed, might be unaware of its specific location. The ATM is not advertised in that bank's name. The ATM is not exclusively used by that bank's customers; it is also used by the customers of other banks in the ATM network. Indeed, any specific ATM in a network might be used infrequently or not at all by the customers of any specific bank participating in the network. Finally, the national bank participating in an ATM network has no responsibility or indeed authority to supervise the daily operations of the ATM. Thus there is no reasonable basis for deeming that ATM a branch for which the bank is responsible.

The shared use of ATMs is analogous to various forms of correspondent banking relationships in which several banks provide reciprocal banking services to each bank's customers at the other correspondent banks' offices. These correspondent relationships have the same effect as the shared use of an ATM — each of them permits one bank's customer to receive cash at the office or branch of another bank. Traditional correspondent banking services have typically included (i) one bank's cashing checks for customers of a correspondent bank, or (ii) one bank's providing cash to the customer of a correspondent bank in order to redeem a letter of credit issued by the correspondent bank. Indeed, the shared ATM is functionally no more than the modernization, by computer, of these correspondent services.[20]

E. The Court Erred by Rejecting the Competitive Advantage Criterion

As previously noted, the third criterion of the McFadden Act's branch test is the requirement that the facility provide a competitive advantage over other banks. *See IBAA*. The District Court failed to apply this criterion. Indeed, the District Court failed even to consider evidence materially relevant to this criterion. The District Court's opinion refers only to Marine's use of the Wegman's ATM. It completely ignores uncontested evidence that other banks (including a state bank) were also using (and proposing to use) that same ATM through two ATM networks.[21]

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[20] In an October 19, 1977 interpretive letter, the Chief Counsel, after reviewing a correspondent relationship, concluded in light of *IBAA* that:

> It is my opinion that the described electronic delivery of banking services, services that have been traditionally available from most financial institutions, represents an acceptable correspondent practice and does not, standing alone, convert one bank into a branch of the other.

[1977-78 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,050 at 77,049 (1977). *See also* Letter of Oct. 18, 1979 from Richard V. Fitzgerald [1977-78 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,208 (1979); Letter of October 3, 1977 from Richard V. Fitzgerald; [1977-78 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,060 (1977).

[21] See Affidavit of Mark A. Zalewski in Support of Cross-Motion for Summary Judgment at ¶ 11, Joint Appendix at 117; Affidavit of Mark Kindig in Support of Defendant Wegman's Food Markets, Inc. at ¶¶ 2, 4, Joint Appendix at 122.

More basically, the District Court failed to consider the impact of shared ATM networks upon competition among banks. Shared ATM networks have had a positive effect in making both state and national banks more modern, efficient and competitive. Shared ATMs are available to both state and national banks, regardless of their size. They also offer ATM services on a lower, shared-cost basis than would generally be available through a proprietary system. It has been estimated that ATM transactions cost one-tenth the amount of transactions conducted through manned teller facilities.[22] These cost reductions are maximized by the economies of scale that result when ATM services are provided on a shared basis. Consequently, these shared networks make ATM services substantially more available to the customers of smaller banks.[23]

The success of shared ATM networks is reflected by the present magnitude and growth of the ATM service industry. It is estimated that more than 100,000,000 ATM access-cards are in circulation and that approximately 2,000,000,000 ATM transactions occur annually at more than 38,000 ATM machines in operation throughout the United States.[24] A substantial part of this ATM use occurs through shared ATM networks. Seven major ATM networks are currently operating on a nationwide basis.[25] In addition, a large number of regional shared ATM networks are currently in operation.[26] It is reported that there are currently almost 200 regional shared ATM networks that include 16,000 ATMs, or about 40% of the total ATMs in operation throughout the country.[27] These regional shared ATMs are performing an estimated 60,000,000 monthly transactions or one-third of the nation's total ATM volume.[28]

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[22] See R. Trigaux, "Technology Seen as Key Strategy Issue; Concern Over Control, Profits Expressed at Retail Meeting," *American Banker* at 1 (Mar. 16, 1983).

[23] *See* S.D. Felgran, "Shared ATM Networks: Market Structure and Public Policy," *Ec. Rev.* at 27 (Jan./-Feb. 1984); J.C. Dean, "Franchising: A Strategic Alternative For Financial Institutions," *The Magazine of Bank Administration* at 22 (Nov. 1983).

[24] *See* B.A. Burchfield, "Shared Networks: The Foundation for the Future of Electronic Banking," *The Magazine of Banking Administration* (Feb. 1984).

[25] These include MasterTeller and networks operated by Cirrus System Inc., Plus System Inc., Nationet Inc., Visa, Automatic Data Processing Inc., and American Express Co. See *Bank Network News*, 1984

Network Directory (Sept. 1983); D.I. Baker & N. Penney *The Law of Electronic Fund Transfer Systems*, ¶ 6.02[5] (Supp. 1983, D.I. Baker & R. E. Brandel).

[26] The largest regional ATM systems are MPACT (Tex., La., Ark., Okla., N.M.); PULSE (Tex., La., Okla.); MAGIC LINE (Mich.); CASH STREAM (Pa., Ohio, N.J., Del., Md., W. Va.); NETWORK EXCHANGE (Del., Md., D.C., Va.); CONVENIENT BANKING (Iowa, Neb., S.D., Mo.); MAC (Pa., N.J., Del.); GEORGE (Pa., N.J., Del.); INSTANET (Ohio, Ind., Ky., W. Va.); TYME (Wis., upper Mich. peninsula). Source: *Bank Network News*, 1984 Directory (Sept. 1983).

[27] *See Bank Network News*, 1984 Network Directory (Sept.-Oct. 1983); *Bank Network News*, vol. 2, no. 3 (June 1983).

[28] *Id. See also* "Shared ATM Networks are Proliferating," *Banking Expansion Reporter*, p. 8 (Oct. 19, 1983).

II. THE DISTRICT COURT'S OPINION WOULD PUT NATIONAL BANKS AT A SUBSTANTIAL COMPETITIVE DISADVANTAGE

The basic purpose of the McFadden Act, as previously noted, was to create a competitive equality between national and state banks. Ironically, the District Court's opinion would violate this purpose by again placing national banks at a substantial disadvantage. If ATMs merely used by a national bank's customers are McFadden Act branches, that use is subject to an interstate banking prohibition, substantial capital requirements and also intrastate geographic limitations imposed by state law.[29] By contrast, as a result of specialized electronic-funds-transfer legislation that many states have enacted, the customers of state banks would be substantially freer to use ATMs even on an interstate basis. This would provide a significant advantage to state banks since banking customers increasingly demand convenient and modern bank services. Indeed, the availability of ATM services is an important factor in a customer's choice of bank.[30]

A. Many States Permit State Banks to Establish ATMs Not Subject to Any Geographic Restrictions

In recent years, many states have enacted special "electronic-funds-transfer" legislation to promote the development of ATMs established by state banks. As a result of this legislation, many states now authorize state banks to establish ATMs that are not regulated as branches. National banks would be at a substantial disadvantage if their use of shared ATMs is subject to geographic restrictions.

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[29] *See* note 9 at page 9, *supra*.

[30] For both state and national banks, the convenience of ATM services has become an important factor in their ability to attract and maintain banking customers. *See, e.g., Geographic Restrictions on Commercial Banking — The Report of the President*, Dep't of the Treasury at 30 (Jan. 1981); "EFT in the United States," *The Final Report of the National Commission on Electronic Fund Transfers* at 103-15 (Oct. 28, 1977); V. M. Bennett and D. Sabbarese "Shared ATM Networks: The Nation and the Southeast," *Ec. Rev.* at 34 (Dec. 1982).

At present, approximately twenty-three states have enacted legislation that provides that state bank ATMs are not branches.[31] In these states, state banks are generally able to establish ATMs without geographical restriction. Several states (approximately eighteen) have also enacted legislation that permits the use of ATMs within the state by state banks located in other states.[32] Thus these states permit even interstate banking, through the use of ATMs, by state banks. National banks would be substantially disadvantaged in these states, if the mere use of an ATM by a national bank is considered to be a branch activity under the McFadden Act.

B. Some States Permit State Banks to Establish ATMs Not Subject to Any Capital Requirements

In the states in which state bank ATMs are not "branches" as a matter of state law, those ATMs are generally not subject to any capital requirements beyond those already applicable to the bank's main office. By contrast, if a national bank's mere use of an ATM is a branch under the McFadden Act, the national bank's capital requirements might significantly multiply by the total number of ATMs in any network in which that bank is participating—even if that bank's customers did not actually use each ATM in the network. This would be an extreme and unfair result.

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[31] Those states are Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Texas, Washington, West Virginia and Wisconsin. See D.I. Baker & N. Penney, *The Law of Electronic Fund Transfer Systems*, ¶ 22.01[2] at n. 44 (Supp. 1983, D.I. Baker & R.E. Brandel).

[32] See D.I. Baker & N. Penney, *The Law of Electronic Fund Transfer Systems*, ¶ 22.01 [2] at n.41 (Supp. 1983, D.I. Baker & R.E. Brandel).

C. Other Financial Institutions Are Permitted to Establish ATMs Not Subject to Geographic Restrictions

If a national bank's mere use of an ATM were to be considered a branch activity, national banks would be at a competitive disadvantage not only to state banks, but also to other national banking institutions. For example, since August 1981, federal savings and loan associations have been authorized by the Federal Home Loan Bank Board[33] to establish ATMs (referred to as "remote service units" or "RSUs") anywhere in the United States "on an unrestricted geographic basis." *See* 12 C.F.R. § 545.4-2.

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[33] The Federal Home Loan Bank Board's August 1981 regulation, quoted above, was promulgated pursuant to 12 U.S.C. § 1464(b)(1), as amended by the Depository Institutions Deregulation and Monetary Control Act of 1980.

III. CONCLUSION

For the foregoing reasons, MasterCard submits that the District Court's judgment and order should be reversed. Without giving consideration to the full three-part definition of branch in *IBAA*, the District Court rendered an opinion that, unless reversed, will have a significant and harmful impact on the ability of national banks to participate in national and regional shared ATM networks. The District Court's opinion did not even consider this consequence. It is a result that clearly contradicts the basic purpose of the McFadden Act.

Respectfully submitted,

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ADDENDUM

1A

Dear Ms.

This is in response to your memorandum dated March 25, 1977, concerning the Inc., holding company arrangement which enables affiliated national bank customers to access on-premise and off-premise CBCTs owned by affiliated state banks.

In that regard, you were advised that N.A., N.A., and N.A., individually own and operate CBCTs that were established on existing bank premises. Authorized customers of those banks may make cash withdrawals from their accounts at any CBCT owned by any of those banks or state chartered affiliate banks located in Duval and St. Johns counties. Four of the state bank CBCTs are remote facilities. The bank whose customer initiated the transaction will pay the bank that owns the terminal a $.75 fee for each transaction.

The question raised in this inquiry is whether national banks must submit CBCT branch applications for those terminals they access on a transactional fee basis.

In my opinion, CBCT terminals accessed by national banks on a transactional fee basis are not national bank branches; therefore, no CBCT branch applications must be submitted.

The leading case on this subject is *IBAA v. Smith*, 534 F.2d 921 (D.C. Cir. 1976), *cert. denied*, 45 U.S.L.W. 3239 (1976). The circuit court of Appeals of the District of Columbia concluded that a CBCT which receives or disburses funds is a branch of a national bank within the meaning of 12 U.S.C. 36(f) if both of the following facts exist:

> (1) The facility is established (*i.e.*, owned or rented) by a national bank, and (2) it offers the bank's customers a convenience that gives the bank a competitive advantage over the other banks (national or state) that do not operate similar facilities.

534 F.2d at 951-52.

If, as in the present case, the accessing national banks only pay for the performance of bank services rather than for a possessory or ownership interest in the particular facility, the CBCT would not seem to be a branch bank as understood by the court. A transactional fee is not the substantive equivalent of rent. The term "rent" used in context with its companion term "own" connotes payment for an interest in real or personal property, not payment for the performance of elecrtronic bank services. For example, a bank does not pay for the services provided by a brick and mortar branch, it pays for the right to take possession of and use that building as bank premises. On the other hand, the payment of transactional fees, pursuant to the enclosed service and sharing agreements, creates no such ownership or necessary interest in the machine for the accessing bank. Only the right to receive certain electronic services is vested in the bank. Accordingly, it is clear that the facilities in question will not be "established (*i.e.*, owned or rented) by the affiliated national bank[s]".

Very truly yours

RICHARD V. FITZGERALD
Assistant Director
Legal Advisory Services Division

ATM INTERCHANGE

State	Sharing Within State	Sharing Between States	Branching
Alabama	1) Permissive sharing between all types of financial institutions. 2) May be required by the Supt. of Banking in some instances.	With reciprocity	
Alaska			1) Permits statewide branching 2) Requires branch application for ATMs
Arizona			1) ATMs are branches 2) Permits statewide branching
Arkansas	Permissive sharing between banks, savings banks, trust cos. and nat'l banks w/their main office in AK.	1) Any bank may be interconnected with an out-of-state CBCT or EFT system 2) No reciprocity is given to out-of-state banks	1) Deployment of CBCTs is subject to geographic restrictions 2) Law is silent as to whether or not CBCTs are branches.
California	Permissive sharing between S & Ls, credit unions, banks or other entities, as determined by the Supt.	S & Ls may establish, use or share RSUs in any other state	1) ATMs are branches 2) S & L RSUs are are not branches
Colorado	1) State and nat'l banks are required to share off premise facilities a) They may share with S & Ls, credit unions and industrial banks.	A bank which has its principal place of business outside of CL is not authorized to conduct banking business in CL.	Communication facilities are not branches

ATM INTERCHANGE

State	Sharing Within State	Sharing Between States	Branching
	2) State chartered S & Ls, credit unions and industrial banks and federally chartered S&Ls w/their main office in CL, are required to share off-permise facilities w/similar institutions a) They may share w/ dissimilar		
Connecticut	Mandatory sharing between state banks, trust cos. nat'l banks and federal S&Ls w/their main office in CN, savings banks, S&Ls, credit unions w/$ 2 million in assets, federal credit unions w/$ 2 million in assets & their main office in CN.	Out of state financial institutions may not establish or use a satellite device in CN unless they have owner's permission, it is used on a transaction fee basis and it does not take deposits (eff. 10/1/84)	1) ATMs are not branches 2) Their deployment is subject to geographic restrictions
Delaware	Permissive sharing between banks and other financial institutions	1) Facilities in DL may be used by out-of-state financial institutions 2) DL banks may use facilities located outside of DL	1) ATMs are branches 2) DL permits statewide branching
Florida	Permissive sharing of ATMs	Out-of-state commercial banks may share FL ATMs or any associated system. They may not accept deposits	ATMs are not branches
Georgia	Permissive sharing between banks and other financial institutions		1) ATMs are not branches 2) Their deployment is subject to geographic restrictions

ATM INTERCHANGE

State	Sharing Within State	Sharing Between States	Branching
Hawaii	Mandatory sharing between any institution (state or federal) authorized to do business in HW		1) Statewide branching is permitted 2) EFT terminals are subject to geographic and numeric restrictions as to their deployment
Idaho	Mandatory sharing between any institution (state or federal) authorized to do business in ID		CBCTs are not branches
Illinois	1) Mandatory sharing of off-premise ATMs (other than two established 3,500 yds from main office) by any state bank able to establish an ATM at that location 2) A bank may share off-premise ATMs w/other financial institutions including state S&Ls & credit unions 3) Financial institutions may share their ATMs w/any bank able to establish an ATM at that location	1) Transmission Facilities operated by Fund Transfer Corporations and proprietary networks may not transfer indicia of transactions (other than credit transactions) to out of state terminals 2) Participation in ATM networks by financial institutions located in contiguous states could be permitted by reciprocal agreements.	
Indiana	An ATM maybe shared by two or more, institutions		1) Off-premise electronic facilities are branches 2) Branching is permitted only in the county where the

ATM INTERCHANGE

State	Sharing Within State	Sharing Between States	Branching
			bank's principal office is located (this does not apply to ATMs) 3) Capital and reserve requirements do not apply to the establishment of electronic facilities.
Iowa	Mandatory sharing between like institutions	Prohibited	1) Satellite devices are not branches 2) Geographic restrictions are placed on their deployment
Kansas	1) Mandatory sharing of off-premise RSUs between state and nat'l banks 2) Mandatory sharing of off-premise RSUs between state and federal S&Ls	(N.B. Prior law limited location of RSUs to anywhere in Kansas: 1984 law has eliminated "Kansas" leaving the location as an ambiguous "wherever," effective 7/1/84)	1) RSUS are not branches 2) They may be located anywhere
Kentucky	1) Permissive sharing between state or federal banks, S&Ls & credit unions w/in the same county where each has its principal office or outside of the county 2) Permissive sharing between state banks, S&Ls outside of their county if dispensing of funds is the only transaction available to the out of county user		1) RSUs are not branches 2) Deployment subject to geographic restrictions
Louisiana	Sharing is permitted if it falls w/in the geographic restriction of branching laws.		1) ATMs are branches 2) Branching is subject to geographic restrictions

ATM INTERCHANGE

State	Sharing Within State	Sharing Between States	Branching
Maine	Mandatory sharing of off-premise facilities by state financial institutions and by federal banks, S&Ls who are headquartered in Maine		Off-premise electronic facilities are not branches.
Maryland	1) Sharing between state banks, savings institutions and trust cos. is not regulated 2) S&Ls are permitted to participate w/any financial institution establishing and maintaining terminals	Foreign banking institutions may operate an electronic terminal in MD, but not conduct a general banking business	Electronic terminals are not branches
Massachusetts	Permissive statewide sharing between all financial institutions, (state & federal) banks, S&Ls, mutual savings banks, credit unions and cooperative banks	1) A CN, ME, NH, RI or VT financial institution may use MU terminals. 2) Any financial institutions w/their main office outside of MU may share or use an MU terminal for certain functions, provided that the terminal was established by an MU institution 3) Any out-of-state financial institution which had established a terminal prior to 12/31/81, may continue to operate it for cash dispensing and travelers cheques and its use is restricted to the customers of the institution	1) Off-premise ATMs are "electronic" branches & may be established w/out complying w/branching laws

ATM INTERCHANGE

State	Sharing Within State	Sharing Between States	Branching
Michigan	Mandatory sharing of off-premise EFT terminals by all state and federal financial institutions, banks, S&Ls, credit unions, consumer finance cos., or a corporation wholly owned by an institution or its holding company parent		1) An off-premise device is not a branch if it is available to be shared by 2 or more financial institutions 2) EFT devices may be established on a statewide basis
Minnesota	Mandatory sharing between state and federal (w/main office in MN) banks, S&Ls and credit unions	EFT terminals may be used by customers of out of state financial institutions, w/the consent of the establisher for the w/drawal of funds & balance inquiries.	EFT terminals may be established anywhere in MN
Mississippi			Deployment of terminals is subject to geographic restrictions which differ from those imposed on branches
Missouri			1) Off-premise CBCTs are branches 2) A bank may establish 2 branches, but only w/in city or county in which it is located
Montana	1) Mandatory sharing between all state and federal institutions located w/in geographic area where terminal use is permitted 2) Mandatory sharing between institutions and their customers anywhere in MT of any ATM regardless of ownership (as of 10/1/83)	1) Customer of an out-of-state institution may debit his out-of-state account at an in-state terminal to pay for goods and services provided that the merchant credits an account to an institution w/in MT;	

ATM INTERCHANGE

State	Sharing Within State	Sharing Between States	Branching
		2) otherwise out-of-state EFT activities are prohibited	
Nebraska	1) Mandatory sharing between state and federal banks (w/their main office in NB) establishing a terminal and other banks wishing to become a user by agreement 2) State credit unions may participate in electronic transmission terminals and systems		Remote facilities are branches
Nevada			Permits statewide branching
New Hampshire	Mandatory sharing between state institutions (bank, co-op. bank, credit union) and w/federal institutions (nat'l bank, S & Ls, credit unions) only if federal regulations require their facilities to be shared w/state institutions		RSUs are not branches and may be established anywhere in NH
New Jersey	1) Permissive sharing between state banks and institutions insured by the FDIC or FSLIC; except that; a principal or mini-branch office w/in 5 mi. of a terminal 3) State S&Ls w/limited facility loan offices (i.e. terminals) may be required to share them w/other banks & S&Ls	1) Out-of-state institutions may share an NJ CBCT estab'd by a NJ bank 2) Customers of an out-of-state institution may use an NJ CBCT to withdraw, transfer and the out-of-state institution	1) CBCTs are branches 2) Statewide branching is permitted 3) Limited facility loan offices may be estab'd w/out regard to other statutory limits on branch offices

ATM INTERCHANGE

State	Sharing Within State	Sharing Between States	Branching
New Mexico	1) Permissive sharing between financial institutions unless 2) Financial institution has its main or manned branch office in the county where the terminal is located then it may only share by agreement w/a like institution		Off-premise ATMs are branches subject to geographic restrictions
New York	Permissive sharing between state banks, savings banks & S & Ls		ATMs are not branches unless they are deployed in areas protected by home office laws
North Carolina	1) Mandatory sharing is required for those devices estab'd at a distance greater than 50 mi. from a bank's main office or closest branch, w/the local bank w/in that area. 2) Permissive sharing between S & Ls	Out-of-state financial institutions are prohibited from establishing EFT facilities in NC	Off-premise EFT facilities are not branches
North Dakota	Mandatory sharing between banks	The state-owned Bank of ND is authorized to provide an EFT system to its customers and to those of state and federal banks located w/in ND & other financial institutions authorized to utilize this service	Off-premise facilities are not branches
Ohio		Prohibits out-of-state banks (no principal office in OH) from establishing or maintaining branches	1) Electronic banking facilities are branches 2) Statewide banking begins in 1989

ATM INTERCHANGE

State	Sharing Within State	Sharing Between States	Branching
Oklahoma	1) Mandatory sharing between any bank wishing to utilize an unmanned facility 2) Permissive sharing w/dissimilar institutions (S&Ls, credit unions) on a reciprocal basis		1) Customer banking electronic facilities are not branches 2) Permits limited branch banking subject to geographic restrictions as of 10/1/83.
Oregon	Mandatory sharing between all financial institutions w/offices in OR	1) Out-of-state institutions w/branches in OR may establish CBCTs 2) CBCTs may be made available to out-of-state institutions who do not have branches in OR w/reciprocal rights given to OR institutions	1) CBCTs are branches, but are exempt from population restrictions and may be placed anywhere.
Pennsylvania			1) Off-premise automated facilities are branches 2) Limited branching based on geographic restriction is permissable 3) Statewide branching in 1998
Rhode Island	Permissive sharing between state commercial banks, savings banks, credit unions, S&Ls and federal S&Ls to the extent consistent w/the antitrust laws		CBCTs are not branches
South Carolina			1) Unmanned off-premise facilities are branches 2) No geographic restrictions on branching

ATM INTERCHANGE

State	Sharing Within State	Sharing Between States	Branching
South Dakota	1) Mandatory sharing between banks 2) Mandatory sharing between S&Ls	An RSU may be used by customers of foreign banks and associations w/consent of the SD bank or association maintaining or using the unit	1) RSUs are not branches 2) May be established anywhere in SD
Tennessee			1) Attorney general has opined that off-premise facilities are branches 2) Law allows branches to be estab'd only in county where parent office is located 3) S&Ls may establish a branch in a contiguous county if chartered for 2 yrs.; any county if chartered for 5 yrs.
Texas	1) Mandatory sharing between banks when the ATM is located in the city or county of the bank's domicile 2) Permissive sharing of ATMs w/S&Ls or credit unions subject to certain restrictions		1) Prohibits branch banking
	N.B. Texas Statute does not apply to an ATM which is used solely for cash withdrawals		
Utah	Mandatory sharing of off-permise ATMs located in a county w/a population of less than 100,000 between customers of all financial	1) Consumer fund transfer facilities in UT may be linked to regional or nat'l systems 2) Financial institutions	1) Consumer fund transfer facilities are special branches & regulated

ATM INTERCHANGE

State	Sharing Within State	Sharing Between States	Branching
	institutions w/an office or branch in such county	located in a contiguous state (and having their principal place of business there) may share UT facilities	differently 2) ATMs may be located anywhere in UT except a county w/a population of less than 100,000 and in close proximity to the main or branch office of another financial institution as to unreasonably interfere w/its business
Vermont			1) Bank & S&L off-premise remote electronic terminals are branches 2) Statewide branching is permitted.
Virginia	Permissive sharing between banks		1) Electronic banking facilities may be estab'd at locations permissive for banks; or 2) at locations subject to geographic restrictions
Washington	1) Mandatory sharing for commercial banks and other person (except as listed in (3) below) 2) Permissive sharing in all other cases		Satellite facilities are not branches and may be located anywhere

ATM INTERCHANGE

State	Sharing Within State	Sharing Between States	Branching
	3) If a mutual savings bank, S&L or credit union decides to share w/one or more commercial banks, it is not required to share w/ any other		
West Virginia	1) Mandatory sharing between banks w/ off-premise CBCTS 2) Permissive sharing between banks & other federally insured institutions (w/their principal office in WV) once so shared, they must be shared w/all such institutions requesting access 3) Once a bank allows any institution to share, an access interchange system has been estab'd. Any other WV institution must be allowed to join the system		CBCTs are not branches and may be placed w/out geographic restrictions
Wisconsin	1) Mandatory sharing between like institutions w/their principal place of business in WI, or 2) by any other like institution obtaining the consent of a like state or nat'l institution (w/its principal place of business in WI) and which is using the terminal, and 3) Such facilities must be shared w/any unlike institution whose home office is in WI and who request access	Prohibited	Electronic facilities are not branches
Wyoming			No statutory branching provisions

Senator GORTON. Thank you, Mr. Elliott.

Mr. Brandel, the tone of your testimony suggested that you might favor outright repeal of the McFadden Act and the Douglas amendment. Do you think that congressional freeing of ATM networks from Douglas and McFadden should be made contingent on some limitation of the machines' capabilities, for example, the check and deposit acceptance?

CBA FAVORS COMPETITIVE FREEDOM

Mr. BRANDEL. I think the Consumer Bankers Association's long-range position is that competitive freedom ought to be the rule in this country and there ought not to be limitations functionally or locationally on bank service facilities.

Senator GORTON. Other witnesses who testified here today indicated a concern that S. 2898 opens the door to full interstate deposit taking. Your testimony, on the other hand, takes the view that the bill is silent on the issue. Can you elaborate on your lack of concern over whether or not there's an inadvertent approval given to interstate deposit taking which is now prohibited by many State laws, or is it simply because you would favor that in any event?

Mr. BRANDEL. No, it's the former, and I think this point was made by several other persons as well, Senator Gorton. The issue of whether individual States can prohibit a given function as opposed to the establishment of a facility is very unclear, a very murky area of the law.

At the moment, some States clearly prohibit of banks located outside that State from accepting deposits in the State, no matter how they go about doing it. Now whether that kind of law would survive a constitutional challenge, for instance, in the case of national banks, is unclear.

The position of the Consumer Bankers Association is that Senator Trible's bill does not deal with that issue. It certainly doesn't make the issue more cloudy. It doesn't really give national banks a step up in arguing that Congress has taken a position on that issue. The Consumer Bankers Association's position simply is that that's an issue that needs be taken care of in another forum at another time.

Senator GORTON. Mr. Hamlin, how many national banks are members of the Independent Bankers Association of America and how many of the Independent Bankers of New York?

Mr. HAMLIN. I can't answer that question with respect to IBAA. There are 400 national banks in New York. Virtually all smaller banks are members of the Independent Bankers of New York and we are evenly split, about 40–60, national banks. Ironically, I'm a national bank as I appear here.

IBAA MEMBERS HOLD SAME VIEWPOINT

Senator GORTON. Is there any divergence from the viewpoint of the national bank members of the IBAA and State bank members of IBAA about the issues about which you've testified?

Mr. HAMLIN. I'm not aware of it in the materials that I'm familiar with and I subscribe to their services and so forth. We have about 2,500 national banks in IBAA, I have just been informed.

Senator GORTON. There would be no difference in their views between national bank members of IBAA and State bank members of IBAA on the subject about which you've testified?

Mr. HAMLIN. No. And the reason for that is that there be a status quo between the two. Our position, as stated, preserves the status quo, both in New York and other places where States have spoken as to the location of branches and incidentally of automatic teller machines.

Senator GORTON. As I understand it, a number of the participants of shared ATM networks are savings and loans and credit unions. Would we have an unfair situation if current law limits banks but not those other institutions?

Mr. HAMLIN. I use the term status quo because that is the situation today. As we know, Federal savings and loans are facilities which are not branches and consequently are not affected by the branch laws, either State or Federal. So we are not changing anything here. They have the same flexibilities with respect to branching now as Federal savings and loans do.

Senator GORTON. You're not advocating any change in the law with respect to that?

Mr. HAMLIN. I'd love to have them be as restricted as we are but, of course, that's not going to happen. So I'm not being unrealistic.

Senator GORTON. Mr. Browning, at one point you emphasized very strongly two words in the proposed ABA statutory change which would allow national banks to compete to at least the same extent as others. Why are those words "at least" in there? Are you hoping that you might get more privileges for national banks?

NATIONAL BANKS SHOULD HAVE EQUAL RIGHTS

Mr. BROWNING. No, that's not the intent at all. In fact, that could become part of the record also. The words "at least" in there is one possible means of bringing the symmetry of convergence of CSBS with respect to State banks versus national banks; not that national banks should have more, but they should have at least equal rights.

Senator GORTON. You note in your written testimony that every State allows its State-chartered institutions to participate in these interstate networks. If the *Marine Midland* case is affirmed on appeal, would it be possible for these State-chartered institutions to maintain their networks without national banks?

Mr. BROWNING. Well, one would have to study that question in more depth, but our reading of it is that they may continue to participate in these interstate networks where national banks would be precluded from participating in interstate banking.

Senator GORTON. Mrs. Cottrell, are you aware of any loss of business suffered by Plus System since the district court decision in *Marine Midland* at least that could be attributed to that decision?

Mrs. COTTRELL. I'm really not capable of discussing the loss of business to the Plus System. Mr. Browning may be able to give you some statistics on that.

Senator GORTON. I'm sorry. Mr. Browning, could you answer that?

Mr. BROWNING. As you well know, this court ruling has recently come down. The Plus System has, however, narrowed its marketing efforts as a result of this decision until some clarity is brought to the issue. Therefore, our soliciation efforts for additional members has been inhibited.

Senator GORTON. In other words, you think you have lost business?

Mr. BROWNING. We certainly haven't solicited it.

Senator GORTON. Mrs. Cottrell, do you have concrete examples of instances in which the implementation or development of electronic fund transfer operations have been deferred or delayed because of the New York decision?

Mrs. COTTRELL. Let me say that the ATM network switch that has been set up in the State of Connecticut, which is where I'm from, started on July 9 of this year, long awaited since Connecticut was one of the last States that started this statewide switch. Of the nine banks that helped develop that switch, several of them are national banks. Certainly this decision, which in the second circuit court includes Connecticut, could have just disastrous effects on the ability of our ATM network switch to continue to operate.

Senator GORTON. Do you think that this makes it imperative that Congress act very promptly; that is to say, in this Congress as opposed to sometime next year?

Mrs. COTTRELL. Absolutely. I think we are at risk.

Senator GORTON. Mr. Elliott, what's your opinion of the alternative of S. 2898 suggested by Mr. Browning to the effect that national banks be able to participate in shared ATM's to the same degree as State-chartered banks in each State?

Mr. ELLIOTT. We would prefer that the bill proceed as it's currently worded. We feel that we don't want to confuse the issue and wish to keep the emphasis on the status quo. At another time, in a more appropriate forum, all the other issues can be surfaced.

Senator GORTON. Including those that you brought up?

Mr. ELLIOTT. Including those.

Senator GORTON. Senator Trible.

Senator TRIBLE. Mr. Chairman, really I do not have additional questions at this time. I appreciate the witnesses' testimony today and would simply make the observation that, Mr. Hamlin, I think you have set forth your point of view quite effectively. I must confess, as the author of this legislation, I am not persuaded by the force of your argument, but I'm sure you are not surprised by that.

You have indicated in very strong terms that the application of this decision is a very narrow one and you regard as nonsense the broader concerns that have been expressed by the community of interest that take part in these networks. We have heard really all the other parties, really have said that this networking system is at risk and that there is a very real economic impact on the further expansion and establishment of these systems and on the provision of services to the consuming public. Reasonable men and women can always disagree.

COURT DECISION JEOPARDIZES ATM'S FUTURE

However, I must confess that as someone also trained in the law, as someone who once shaped at least a few district court decisions as a law clerk to a distinguished Federal district judge, and now as someone who makes law, I really am not at all persuaded that the application of this decision is so narrow. Indeed, I am convinced more so than ever after hearing from the witnesses today that this decision potentially places a great risk on the system of ATM's that is now providing an essential and important service to the consuming public.

Surely, the Congress should not respond to every district court decision, good or bad, and there are many very bad ones; but here we are talking about a district court decision that does, in my judgment, have application far beyond the Federal district court in which it was rendered. It has very obvious application potentially to the circuit and well beyond that and I'm not persuaded that the Congress has to wait and put people with substantial economic interest at risk and require that they are put through the wringer of extended litigation. And that is the reason for this legislative initiative and it will be up to my colleagues to judge it on its merits and determine whether action is important at this time or not. But I want to commend the job that you've done, and I mean that very sincerely. You have been outnumbered today, but you have set forth a point of view that's an important one and I think you've done that very effectively and I want you to know that I have read your statement and I've heard every word that you've said, as have my colleagues here today.

Mr. HAMLIN. Can I respond just briefly? I think we can do what we all want to do without going after some of those very essential policies that I've talked about earlier, by introducing the concept of the correspondent banking service. I would regard the interstate switching as a corresponding service, thus not branch operations. Many of the briefs before the second circuit have included that concept.

What that allows us to do is to permit interstate switching in virtually all the markets of New York that are worth anything to anybody, including New York City and principal cities upstate, would be permitted interstate ATM networks.

This case does not prohibit that. Our position does not prohibit that. It's not necessary. And as a person schooled in the law, we all know the technique of distorting a case to such point and then attack the distortion, and that's precisely what's been going on here today.

I would refer you to the actual language of the case and the outcome of the circuit court's decision. We are holding—maybe Congress can act by October 1—we're going to have the arguments on October 1.

Senator TRIBLE. Well, we appreciate your testimony and that of your colleagues in the financial services industry.

Senator GORTON. Thank you. I'm going to ask you one more question.

Mr. Browning, we're going to test you right now. If the only choice were the ABA language or nothing this year, how many of you witnesses would prefer nothing this year? Just raise your hands.

Mr. **Hamlin**. Nothing this year at all.

Senator **Gorton**. Let the record show that only Mr. Hamlin raised his hand. Mr. Browning did pretty well.

Other members of the committee and staff are also likely to have questions which they will submit to you in writing, and we appreciate your help. With that, thank you very much.

The meeting is adjourned.

[Whereupon, at 11:50 a.m., the hearing was adjourned.]

[Response to written questions from the committee follow:]

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OFFICE OF THE PRESIDENT

October 3, 1984

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Honorable Jake Garn
Room SD505
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Garn:

By this letter I am responding to the questions regarding state ATM law forwarded to CSBS by your letter of September 24, 1984. These responses are submitted on behalf of the Conference of State Bank Supervisors, as an extension of the testimony on S. 2898 presented on Wednesday, September 19, 1984. The responses contained herein are submitted pending review by counsel for both the Conference and the State of Delaware and shall not be considered exclusive or binding as to any legal position which may be taken pursuant to subsequent litigation. These responses are submitted in good faith and are believed to be accurate given the best information available to me at this time.

The questions submitted to me and my responses thereto are as follows:

1. Can you account for which states would, in effect, disadvantage national banks at the expense of state banks, if Congress does nothing?

Response: The laws of 20 states (Alabama, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Dakota, Texas, Washington (until 7-1-85), West Virginia and Wisconsin) are more restrictive with respect to the location of "branches" within their borders than with respect to the use of shared automated teller machines (ATMs). (These figures are based upon a draft survey of state law done by CSBS staff and are believed to be accurate.)

However, CSBS does not believe that national banks should in fact be placed at any competitive disadvantage in these states. On the basis of the laws of these states, courts

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could, and in our opinion, should, treat more permissive ATM laws as exceptions to the McFadden Act, applicable to national banks as well as state banks. Of course, Congressional clarification as to the above status of state ATM laws may be helpful to the Office of the Comptroller of the Currency and to the courts. Therefore, CSBS would be happy to support an amendment so clarifying the McFadden Act.

The position of CSBS with respect to the incorporation of permissive state ATM laws by the McFadden Act is consistent with the position of the U.S. Court of Appeals for the D.C. Circuit in IBAA v. Smith, to wit:

> The net result of the above analysis is as follows: If a state permits its state-chartered banks to establish CBCT's for the purpose of (1) receiving deposits, or (2) paying checks, or (3) lending money, then national banks in that state also can establish CBCT's limited to the functions permitted under state law.
>
> This result would hold true even in a state that prohibits branch banking, but permits the use of CBCT's since they are not considered "branches" under state law.
>
> Since we hold that off-premises CBCT's are "branches" within the meaning and intent of section 36(f)'s federal definition, for each CBCT a national bank wishes to establish it must (1) file a branch application with the Comptroller, (2) secure the Comptroller's approval, and (3) satisfy the capital and surplus requirements for branches found in (a) sections 36(d) and 51 of the National Bank Act and (b) the state banking statutes. Our holding, however, does not mean that national banks can not establish and operate off-premises CBCT's in a state (e.g., Florida) that generally prohibits branch banking when that state does not define CBCT's as "branches" for purposes of state law. Under section

> 36(c) national banks can establish and operate CBCT's ". . . when, where, and how state law would authorize a state bank to establish and operate such a branch . . .":
>
> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches [i.e., CBCT's] . . . if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.
>
> Of course, in order to secure the Comptroller's approval, national banks will have to comply with any additional restrictions on CBCT's prescribed by the Comptroller, e.g., the thirty day notice requirement and the fifty mile limit. Under the federal statutory scheme CBCT's are "branches" within section 36(f)'s federal definition; therefore, for federal purposes the state law applicable to CBCT's is a part of the "branch" banking law of that state, which is incorporated into the National Bank Act by section 36(c). (footnotes omitted)
> IBAA v. Smith, 534 F2d 921, 948-949 (D.C. Circuit), cert. denied, 429 U.S. 862 (1976)

2. You mentioned in your testimony that in your state, Delaware, you have a lenient attitude toward ATMs of national banks, but that you require national banks to file reports with the state on their ATM activities. What is Delaware's legal authority under the McFadden Act for requiring such reports from national banks?

Response: My testimony on this point was that "We do require national banks to submit certain reports. We require them to have the same record retention schedule that state banks do. When we went to the ATM part, we dealt only with the state chartered banks." With regard to national banks, we require only the filing of their quarterly call report and what current time and savings deposit plans they have.

Generally, the bases for state statutes regarding electronic facilities include the right of states to regulate commerce within its borders, the general reservation of "powers and jurisdiction" to states over banks, bank holding companies and subsidiaries thereof found in Section 7 of the Bank Holding Company Act, the general police power of the states and state authority under the McFadden Act. As to the authority of the states under the McFadden Act, the Supreme Court has held that "a 'branch' may be established [by a national bank] only when, where, and how state law would authorize a state bank to establish and operate such a branch." The Supreme Court has further said that the McFadden Act "has incorporated by reference the limitations which state law places on branch banking activities by state banks." This is so because "Congress had deliberately settled upon a policy intended to foster 'competitive equality'" between national and state banks. (First National Bank in Plant City v. Dickinson, 396 U.S. 122, 130-31 (1969))

These holdings relevant to bank branching are equally relevant to the establishment and operation of ATMs, where such state ATM laws constitute an exception to state branching laws, as set forth in my response to your first question, referencing the case of IBAA v. Smith. Where an exception to state branching law is made conditional, any institution, state or federal, must meet those conditions in order to qualify for the exception.

3. If national banks were subject to state jurisdiction with respect to "ownership, operation and permissible functions" of ATMs, as in your proposed amendments to S. 2898, what would be the additional regulatory and reporting burden to national banks, on a state by state basis? To what extent would this generate redundant reporting and application procedures with respect to ATMs shared by several national banks?

Response: National banks are now subject to state jurisdiction in the above-mentioned areas by virtue of their need to qualify for the state exceptions to the McFadden Act as discussed above. National banks, as state banks, must meet conditions precedent in order to qualify for such exceptions. As I testified, to the best of my knowledge, national banks now do comply with state law in these areas. It appears that such compliance is probably based on the legal advice of their counsel, relying on the court decisions in IBAA v. Smith and Plant City, discussed above. Therefore, my response must be that no additional regulatory or reporting burden would be placed on national banks by CSBS language which simply affirms the existing provisions of the McFadden Act.

CSBS policy is clear on the following two relevant points:

1. States should encourage the establishment and operation of such EFT systems subject to reasonable requirements as the state may choose, including the nature and geographic scope of transactions to be offered.

2. States should supervise and examine state-chartered institutions providing EFT services for customers of institutions located elsewhere; and the Comptroller of the Currency or the Federal Home Loan Bank Board should supervise and examine respective federally chartered institutions.

Little redundancy could be expected, save to the extent the availability of certain information is necessary for state officials to protect valid state and public interest in the establishment and operation or use of ATMs. To the extent that such redundancy is necessary, it would parallel only to some small degree the redundancy in examination, supervision and reporting to which state-chartered banks are now subjected in order to satisfy federal interest in the banking system.

The most significant feature of duplication and redundancy in bank supervision is the double track that each state-chartered institution must follow in regulation and examination, as well as in control of market entry and expansion. Almost step for step, a state-chartered bank has to follow a similar and largely redundant track with either the FDIC or the FRS. In contrast, national banks are regulated by only a single entity, the Comptroller of the Currency. Although all national banks are insured by the FDIC and all are required by law to be members of the FRS, neither the

FDIC nor the FRS routinely is involved in the supervision and regulation of national banks. The FRS and FDIC basically accept the recommendations, opinions and examination findings of the Comptroller in meeting their responsibilities. States generally believe that the FRS and FDIC should accord them the same recognition as the Comptroller in carrying out their functions. This would mean a stepping back by these specialized federal agencies from their involvement in examination, regulation and the approval process of applications for state-chartered banks and some increase in their regulatory presence with national banks.

Respectfully submitted,

John E. Malarkey

John E. Malarkey
Vice President and Chairman
Federal Legislation

JEM:drj

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United States Senate

COMMITTEE ON BANKING, HOUSING, AND
URBAN AFFAIRS
WASHINGTON, D.C. 20510

September 24, 1984

Mr. Phil Corwin
Independent Bankers Association
of America
1625 Massachusetts Avenue, N.W.
Suite 202
Washington, D.C. 20036

Dear Mr. Corwin:

Thank you very much for testifying on S.2898 on Wednesday, September 19, 1984.

I believe Senator Gorton mentioned the possibility that there would be additional written questions submitted to you. The questions are attached. Because of the time deadlines involved, I would appreciate your written responses by Monday, October 1, 1984.

Once again, thank you for taking the time to appear on this important legislative matter.

Sincerely,

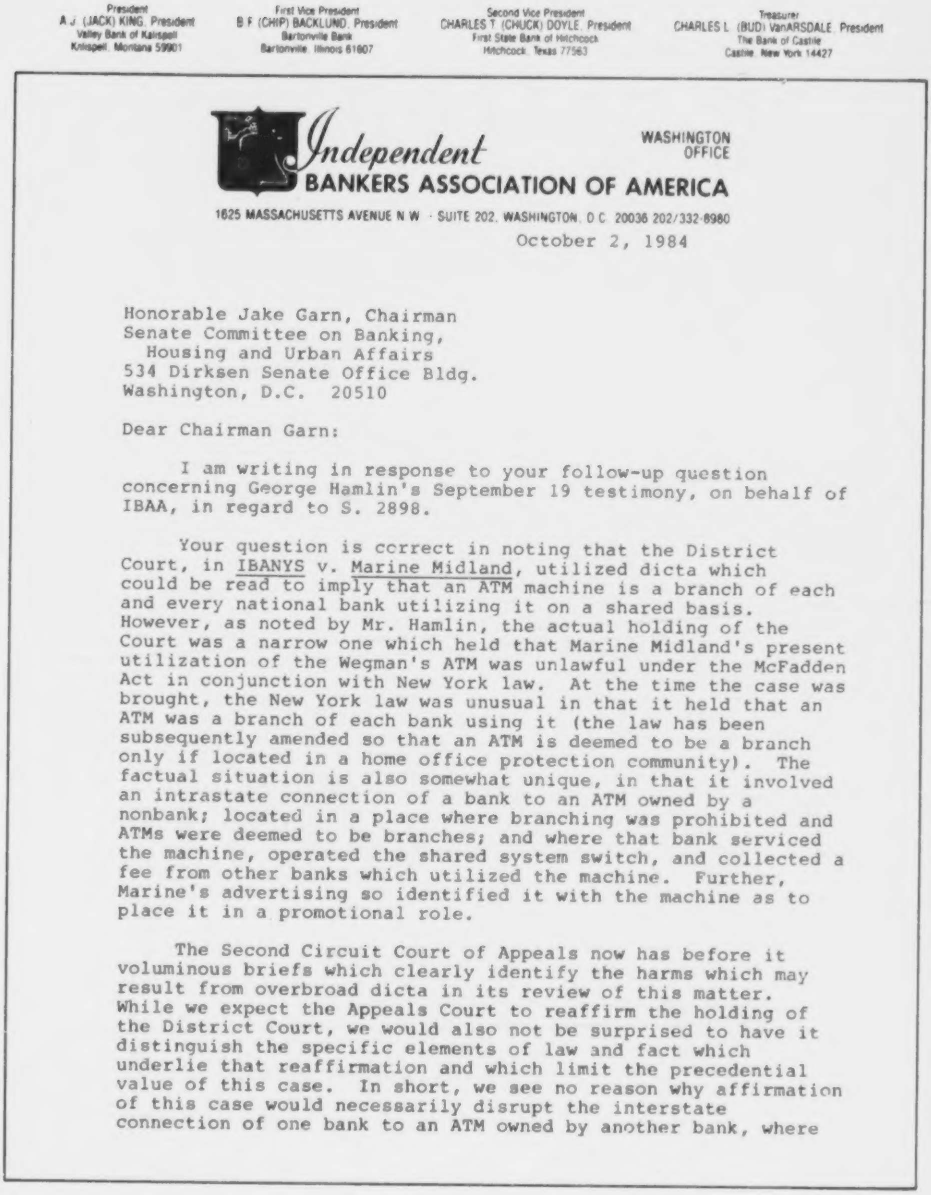
Jake Garn
Jake Garn
Chairman

JG:vha

Enclosure

QUESTIONS FOR MR. GEORGE HAMLIN:

1. In your testimony, you stated several times that IBANYS v. Marine Midland involves only an intrastate issue. Since the court clearly concluded that the Marine Midland ATM was a "branch" of Marine Midland, why does this not indicate that banks participating in interstate ATM networks have violated the McFadden Act, in your opinion?



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October 2, 1984

Honorable Jake Garn, Chairman
Senate Committee on Banking,
Housing and Urban Affairs
534 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Dear Chairman Garn:

I am writing in response to your follow-up question concerning George Hamlin's September 19 testimony, on behalf of IBAA, in regard to S. 2898.

Your question is correct in noting that the District Court, in IBANYS v. Marine Midland, utilized dicta which could be read to imply that an ATM machine is a branch of each and every national bank utilizing it on a shared basis. However, as noted by Mr. Hamlin, the actual holding of the Court was a narrow one which held that Marine Midland's present utilization of the Wegman's ATM was unlawful under the McFadden Act in conjunction with New York law. At the time the case was brought, the New York law was unusual in that it held that an ATM was a branch of each bank using it (the law has been subsequently amended so that an ATM is deemed to be a branch only if located in a home office protection community). The factual situation is also somewhat unique, in that it involved an intrastate connection of a bank to an ATM owned by a nonbank; located in a place where branching was prohibited and ATMs were deemed to be branches; and where that bank serviced the machine, operated the shared system switch, and collected a fee from other banks which utilized the machine. Further, Marine's advertising so identified it with the machine as to place it in a promotional role.

The Second Circuit Court of Appeals now has before it voluminous briefs which clearly identify the harms which may result from overbroad dicta in its review of this matter. While we expect the Appeals Court to reaffirm the holding of the District Court, we would also not be surprised to have it distinguish the specific elements of law and fact which underlie that reaffirmation and which limit the precedential value of this case. In short, we see no reason why affirmation of this case would necessarily disrupt the interstate connection of one bank to an ATM owned by another bank, where that ATM is located in a state that permits branching and/or exempts ATMs from the definition of branch, and where the state is one of the three out of four that provides for interstate usage of ATMs. Further, we would expect the Court to give some guiding response to the arguments before it which characterize the operation of an interstate EFT switch as a permissable correspondent banking service.

Finally, in the event that the Appeals decision does prove to be damaging to interstate EFT systems, this matter could be simply cured by language such as that contained in Title X of S. 2851, making explicit the right of the states to enact conditional reciprocal interstate branching laws. This type of resolution would be far preferable to the overbroad language of S. 2898, and its resulting detrimental impact on the dual banking system.

I hope that this response clarifies IBAA's view of the precedential impact of the IBANYS case.

Sincerely,

Philip S. Corwin

Philip S. Corwin
Legislative Counsel

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**GOVERNMENT
RELATIONS/
RETAIL BANKING**

FEDERAL COUNSEL
William J. Stanley, Jr.
202/467-5787

October 2, 1984

The Honorable Jake Garn
United States Senate
Chairman, Committee on Banking,
  Housing, and Urban Affairs
534 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Additional Questions Posed to Dale Browning Regarding
S.2898 - The Banking Convenience Act of 1984

Dear Senator Garn:

We have enclosed the requested answers to the questions posed in your letter of September 24th.

I have discussed these responses with Mr. Browning, and he has asked me to forward them on to you.

We also would like to thank you again for the opportunity to testify on this very important issue and legislation. Although prospects for further action this Congress do not look promising, we look forward to working with your Committee next Congress to achieve a permanent resolution to this problem.

Very truly yours,

William J. Stanley, Jr.

Enclosures

QUESTION 1:

1. Would the American Bankers Association think that legislation in this area is necessary if the Marine Midland case is not affirmed by the Second Circuit?

The short answer to your question is a resounding "yes". First, even if the Court of Appeals does not "affirm" the lower court decision, it might issue an equivocal opinion that could confuse even further the state of the law on this subject. This would produce even more business and legal uncertainty, particularly in view of earlier opinions issued by the District of Columbia Court of Appeals in the IBAA v. Smith case, and by the Comptroller of the Currency in its interpretations and regulations.

Second, it has been the position of this Association for over five years that legislation to address in a very straight forward manner the legal status of electronic terminals is necessary. It has been clear for years that most of the banking laws in the state and federal level were crafted in an era that did not contemplate electronic banking or debit cards. The Marine Midland case is just the most recent demonstration that pre-depression era law does not adjust well to modern banking technology. Because this is so, the type of problem manifested in the Marine case (i.e., statutes being stretched and interpreted to cover issues and technologies not contemplated when the legislation was drafted) will certainly crop up again, and another "quick fix" may again be necessary.

Our approach, as laid out in some detail in the attachments to our testimony, is and has been to advocate a comprehensive statute to address the electronic banking issue. This is certainly a better approach than a continuing series of ad hoc patches. Perhaps the Marine case will serve as the "looking glass" to show the Congress that the time has come for a comprehensive review of electronic banking.

QUESTION 2:

2. Your testimony indicated certain reservations about S.2898, and preference for an approach advocating simple "parity" between national and state chartered banks. Would the American Bankers Association support S.2898 if no other legislation could be proposed on this issue?

Let me clarify, for the record, what we intended our testimony to indicate: a preference for the approach taken in S.2898.

The issue raised by the Marine Midland case is whether a shared ATM should be considered a branch of a national bank. Your bill addresses that issue head on and states they are not branches. This is the best approach to the problem. Our only concern with that approach is the ancillary issues that may inadvertently appear to be addressed. Those concerns are laid out in some detail in our written statement, and I won't go into them here in detail. Sufficient to say however, that our fear is that the language of S.2898 might be construed to address matters other than sharing of electronic terminals, and go beyond a simple status quo bill.

Since it is the stated intention of the sponsors of the bill to do nothing more than restore the status quo, we have suggested Report language which clarifies that the status of shared terminals is the only issue addressed by the bill. With that fact clarified, S.2898 has our enthusiastic support.

The alternative approach offered by ABA was submitted not as a preferable approach, but as a perhaps more politically feasible approach. As detailed in our written statement, many of the concerns of other groups with the language of S.2898, would not be present with the alternative we have offered. Nevertheless, the direct approach of S.2898, with the clarification discussed above, remains the preferable approach.

STATUS OF ATM'S UNDER STATE BRANCHING LAWS

THURSDAY, SEPTEMBER 20, 1984

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
Washington, DC.

The committee met at 10 a.m., in room SD-538, Dirksen Senate Office Building, Senator Paul S. Trible presiding.

Present: Senators Trible and Gorton.

OPENING STATEMENT OF SENATOR TRIBLE

Senator TRIBLE. The hour of 10 having arrived and passed, it's time to begin our second day of hearings on the Banking Convenience Act of 1984. I'd like to welcome all of you here today.

Our aim is to preserve and foster the use of shared automated teller machines for the benefit of American consumers. People are demanding and receiving the convenience of shared ATM networks on a massive and ever increasing scale. Today, many thousands of ATM's in shared networks serve customers in every State and region in the United States. In the 200 regional networks, customers are now using 16,000 ATM's to perform 60 million banking transactions every month. Seven national networks permit consumers to obtain cash anywhere in the United States.

There can be no doubt that consumers want these services and preserving these networks is what the legislation before us is all about.

Earlier this year, as you all know, the U.S. District Court in New York in the case of *Independent Bankers Association of New York* v. *Marine Midland Bank* issued a ruling which could jeopardize participation of national banks in shared ATM networks. As we will hear today, this could seriously affect the provision of ATM services.

It is obvious that customers of national banks would be hurt if their banks were unable to participate in shared ATM networks, but it's not just those customers who would be hurt. The customers of the 9,000 banks, thrifts, credit unions, credit card companies, and retailers who participate in these networks today would also be losers. ATM services would be limited and costs would increase.

For example, if the *Marine Midland* decision is sustained, customers in Virginia's Sovran Bank would be denied the use of hundreds of ATM's across State lines in Washington, Maryland, North Carolina, and South Carolina. ATM services within States could be adversely affected and surely would cost more. Similarly, Virginia customers in 58 banks, thrifts, and credit unions which now belong to the MOST and Network Exchange networks could be denied access to ATM's throughout Washington, Virginia, and Maryland.

These kinds of problems would develop throughout the country. Senator Humphrey and I have proposed this legislation to avoid these problems and the chilling impact of extended litigation, in order to continue the provision of ATM services to millions of customers.

The Banking Convenience Act writes into law the regulations of the Comptroller of the Currency which led to national bank participation in shared ATM's, thereby restores the status quo as it existed before the *Marine Midland* ruling, and avoids disruption in shared ATM networks.

Yesterday, this committee heard the views of banking groups, Federal and State banking regulators, and the electronic funds transfer industry. Most of the witnesses supported the measure and urged quick adoption of this legislation.

Today, we will broaden our perspective to consider the views of consumer groups, thrifts, credit unions, their regulators, and food retailers. This broader perspective is essential to future bank participation in shared ATM networks and to the survival of the networks themselves. It's not just a national bank issue. It's not just a bank issue. This issue concerns consumers in the broadest sense, investors in shared ATM networks, thrifts, credit unions, and credit card companies that participate or want to participate in shared ATM networks, and retailers interested in serving their customers better.

So I welcome the witnesses today and look forward to a stimulating session in this second day of hearings.

Senator Humphrey regrets he could not be here today due to schedule commitments, but has submitted a statement for the record.

[The prepared statement follows:]

STATEMENT OF SENATOR HUMPHREY

Mr. Chairman, millions of consumers currently enjoy the convenience of conducting a wide variety of banking transactions from virtually anywhere in the country through an ATM network. No longer are consumers required to rearrange their busy schedules around the often scarce hours of a bank or wait in seemingly never-ending lines to conduct simple banking transactions. Today, consumers have a choice.

As a result of ATM networks, bank customers are able to pull a plastic card from their wallet or purse, insert it into an ATM and withdraw cash from, or deposit funds into their checking or savings account, make a balance inquiry, pay bills to third parties, or any other number of permissable banking services. All of this is provided with virtually no restriction on the location of this activity or the time of day in which the business is conducted.

The growth in participation by financial institutions in shared ATM networks and the volume of transactions made nationwide demonstrates consumer demand for the convenience, cost savings, and efficiency of such services. According to industry calculations, approximately 40 percent of the 40,000 machines installed in the United States are linked to 1 of approximately 200 regional shared networks. Moreover, each month these shared networks are performing an estimated 60 million transactions.

However, users of these networks are at risk of losing these services as a result of a recent district court decision. In the case of *Independent Bankers Association of New York* v. *Marine Midland Bank,* the district court held that a shared ATM that was owned by a supermarket but used by the customers of Marine Midland was a branch of the national bank under the McFadden Act.

This decision would seem to reverse longstanding Comptroller rulings and interpretive letters concerned the application of the McFadden Act's branching restrictions. For example in 1976, the Comptroller issued an interpretive ruling closely paralleling the decision in *IBBA* v. *Smith* that an ATM would be considered a branch under the McFadden Act. However, the rule further clarified that any ATM "which is not established (i.e. owned or rented by the bank) is not a branch of a national bank and not subject to the provisions of the McFadden Act. Financial institutions have traditionally relied on this interpretation to provide millions of consumers with the convenience of shared ATM networks.

However, if the district court's decision is upheld, conceivably national banks would be unable to allow their customers to use the ATM's they now use, since this would constitute illegal branch banking. Not only would the decision have a chilling effect on the future developments of these networks, but networks already in existence could also become dismantled.

In an attempt to avoid the potential for disruption of existing shared ATM networks, Senator Trible and I have introduced S. 2898, the Banking Convenience Act of 1984. It is the intent of this legislation to merely codify existing Comptroller rulings and interpretations which have led to national bank participation in shared ATM networks. The bill simply states that a national bank may share, or permit its customers to use, an ATM that is not established by the bank. An ATM used in this manner would not be a branch for purposes of the McFadden Act or State branching restrictions. The bill further clarifies that an ATM is not "established" by a national bank if the machine is neither owned or rented by the bank. Nothing else should be read into the intent of this legislation.

I am pleased Senator Gorton has called us together today to review S. 2898. This legislation is of utmost importance to millions of consumers. I particularly want to commend Senator Trible for his interest and hard work in this regard.

I look forward to reviewing the comments and suggestions of the distinguished panels before us today.

Thank you.

Senator **Trible**. Our first panel includes Dan Brumbaugh, Deputy Chief Economist, Office of Policy and Economic Research, Federal Home Loan Bank Board, and Wendell Sebastian, General Counsel, National Credit Union Administration.

Gentlemen, I would say to you and the other witnesses today that your full testimony will be made part of the record. You can read your testimony or you can summarize it. I can also tell you and the other witnesses that I have read all the testimony submitted to the committee and it appears that I'm the only one here today, so you might want to summarize your more salient points and we can then move ahead.

STATEMENT OF DAN BRUMBAUGH, DEPUTY CHIEF ECONOMIST, OFFICE OF POLICY AND ECONOMIC RESEARCH, FEDERAL HOME LOAN BANK BOARD

Mr. BRUMBAUGH. Thank you, Senator. It's a pleasure to be able to testify before the committee on behalf of the Bank Board. I will summarize my testimony for you.

It's also a pleasure to be here with Mr. Sebastian. He and I were closeted together for a good part of last winter on the Vice President's task force on financial regulation. He skillfully, gratuitously, and with good humor abetted the efforts of the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and various other regulators in their attempts to carve away our turf, and it's through no fault of his own that we continue to be an independent Federal regulatory agency.

Senator TRIBLE. I'm glad to bring you two together again.

Mr. BRUMBAUGH. It's a pleasure.

INTERPRETATION OF THE RECENT DECISION

The Bank Board thinks that the bill which you and Senator Humphrey have designed is a perfectly appropriate response to the decision in the *Marine Midland Bank* case. It might be helpful, just so that we understand the Bank Board's interpretation of the law, if I briefly review our interpretation of that decision.

The bill would supersede the *Marine Midland* decision and in our opinion reestablishes the status quo. There was testimony yesterday that it would exceed the status quo as it existed before the decision. We disagree with that interpretation.

We also believe that before *Marine Midland* ATM's shared by national and State member banks for a fee rather than owned or rented were not considered branches under the appropriate Federal statutes. There was testimony yesterday that if this decision were to stand, automatic teller machines would not necessarily be considered branches under some circumstances. Although we believe that that's a possible interpretation of the decision, we think it's an unlikely one. In fact, we believe almost certainly that if the decision stands, automatic teller machines will be considered branches.

Federally chartered savings and loan associations have none of the constraints applicable to national banks and State member banks with respect to automatic teller machines. Under the relevant law and Federal Bank Board regulations, federally chartered savings and loan associations are permitted to establish what we call remote service units, that are, by any other name, automatic teller machines, without geographic limitations.

I actually asked our Office of General Counsel if in fact there was absolutely no geographic limitation and I'm told that this is correct.

At the present time, approximately half of the savings and loan industry, as we understand it, either is using shared ATM's or intends to use them, and that of the current participants, savings and loan associations comprise over 10 percent of the membership in the country's largest automatic teller networks.

I don't think it's necessary to say any more than that I believe that there's a broad consensus that automatic teller machines provide an enormous benefit to consumers, that most consumers agree that these benefits exist, and that even consumers of services provided by some banks in New York, which impose these services on some depositors, now agree that they provide a tremendous service to consumers. And I don't think there's any reason to say more other than to agree with you that the enormous growth in these automatic teller machines in the last few years is testimony to that.

COSTS OF ATM'S

One of the more interesting aspects of the issue, however, it seems to me, especially as an economist, is cost. It seems to me there are at least two cost benefits that these shared ATM's used for fees, as opposed to owned or rented, provide. One is that there appears to be an enormous initial cost if one wants to set up even one remote unit let alone a network. For example, I'm told that even the least expensive so-called in-the-wall automatic teller machine costs around $11,000 and that the freestanding models which I think are more frequently found in places like Wegman's Supermarket cost around $25,000.

A network of any size clearly is what the economists would call the absolute cost barrier. This barrier certainly does exist for small depository institutions, and even medium-sized depository institutions, and we think that it's probably a substantial barrier imposed on any depository institution that might want to use such a system in the absence of these "for-fee" systems.

In addition, there appears to be a relatively significant reduction in the cost per transaction when the number of transactions per day per ATM per unit of time is high. This is what generally justifies statements in the literature that I have seen that there are large economies of scale.

The data on the economies of scale, in my opinion, are sparse, and is based primarily on the testimony of people in the industry without many specific examples of why those economies exist. But I think they do, and I think as the data and information becomes more available, we will see that that is indeed the case.

Even now, the combination of costs at the moment prevents many small institutions from joining these shared ATM networks. As an example, I talked to a director of a credit union here in town whose credit union had recently shopped for a network here in Washington, DC and Maryland, which is now a joint network. The figures he cited were a $5,000 initiation fee and $2,500 to make the appropriate computer conversion, so that their initial setup cost would be approximately $7,500. Those costs could be higher if, as in many small institutions, they were still pencil and ledger and first would have to purchase a computer system.

In addition, there were variable fees, a $1,000 annual fee: $150 per month fee for periodic reports, and a transaction cost per use for each consumer of approximately 65 cents.

In the view of the director I talked to, any institution with assets of less than $10 million probably couldn't join such a fee-based automatic teller machine network.

More importantly, it seems to me, however, even though there are some institutions that are excluded, is that, without your legislation, the contraction in the networks that we can expect to occur would retard the kind of technological development that brings down the prices of these sorts of things dramatically. This is exactly the kind of product for which an expanding market will lead to substantial technological change and a reduction in costs. I'm almost certain that those institutions which currently cannot participate will be able to in the near future by virtue of the cost reductions that will result.

From the perspective of those institutions which the Bank Board regulates, we think that in the absence of your legislation, given the fact that 82 percent of the participants in the shared networks are national banks and State member banks, participation by savings and loans would be jeopardized because in all likelihood there would be a contraction of these networks and that would, relative to the situation now, generally harm the institutions that we regulate.

One other issue I didn't mention in my testimony and that I heard only a brief reference to yesterday, but that I've seen in literature and in some other popular press accounts of shared networks, is the possible exertion of monopoly power by these networks. In the context of the merger between MOST and Network Exchange here in the Washington metropolitan area, you can see how these fears are generated. I'm told that an overwhelming percentage of the depositors in this area now have deposits in depository institutions that belong to this single network. You can easily see how allegations would arise that this conveys to these depository institutions the potential for monopoly power by virtue of having a single network.

In my opinion, that's almost impossible. There are any number of reasons that we can get into later why monopoly power is not likely to develop merely by reason of agreements or recognized interdependence.

Finally, you asked the Bank Board to comment on the amendment provided by the Conference of State Bank Supervisors. Our understanding is that that amendment would subject national and State bank use of shared ATM's to State laws regarding the operation and location of automatic teller machines. We believe that would be a mistake, that allowing that sort of thing would probably result in greater restrictions on national and State member bank use of shared networks, and would have a deleterious effect on the institutions which the Bank Board regulates.

In addition, there's a troublesome phrase in the amendment referring to "pertinent State laws" which would probably increase the likelihood of both litigation and controversy because some of those "pertinent State laws" could be misinterpreted to include branching laws, thereby further limiting ATM's.

In conclusion, let me just say that the Bank Board thinks that your legislation is a perfectly appropriate reaction to the *Marine Midland* decision.

Thank you very much.

[The complete statement follows:]

. STATEMENT OF
DAN BRUMBAUGH, DEPUTY CHIEF ECONOMIST
OF THE
FEDERAL HOME LOAN BANK BOARD

Mr. Chairman and distinguished members of this Committee: I am pleased to be here today to discuss the Bank Board's views on S. 2898, the Banking Convenience Act of 1984. For the reasons explained below, the Bank Board believes enactment of this bill would be appropriate.

S. 2898 would permit national and state member banks to use shared automatic teller machine ("ATM") networks regardless of state laws restricting bank branch locations. The bill would supersede the recent U.S. District Court decision in Independent Bankers Association of New York State, Inc. v. Marine Midland Bank N.A., thereby restoring the status quo as it existed prior to that decision. Before the Marine Midland decision, shared ATMs used by national and state member banks for a fee, rather than owned or rented, were not considered branches under section 5155 of the Revised Statutes, 12 U.S.C. § 36, and were therefore not subject to state branching law restrictions.

The Marine Midland decision does not directly affect the authority of federally chartered savings and loan associations to establish remote service units ("RSUs"). Federally chartered savings and loan associations are permitted by statute to establish remote service units without geographic limitation. 12 U.S.C. § 1464(b)(1)(F). Their authority to establish and use RSUs, including shared ATMs, is subject to the provisions of the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693 et seq.; Federal Reserve Board

Regulation E, 12 C.F.R. § 205.2; and a Bank Board regulation, 12 C.F.R. § 545.141. The Bank Board's regulation expressly permits federally chartered savings and loan associations to establish, use, or share RSUs without regard to geographic location. By virtue of this authority and relevant state laws, almost half of the savings and loan industry is participating in, or seriously considering joining, shared ATM networks.[1] Current savings and loan participants comprise over 10% of the membership of the country's 50 largest ATM networks.[2]

The Bank Board believes that savings and loan association involvement in shared ATMs benefits the consumer. Remote ATMs provide bank and thrift customers with access to their checking, savings, and credit card accounts at convenient locations. At some ATMs, customers may pay bills to third parties. In many cases, travelers may receive these services through ATMs located away from home.

For the largest depository institutions, the volume of transactions conducted through an ATM justifies a proprietary interest in an ATM network. For most institutions, however, the initial set-up costs are prohibitive and the institutions have consequently turned to shared networks. In addition, the average cost per transaction appears to be significantly higher when the number of transactions per ATM per month is low.[3] Because shared ATM networks can substantially increase transaction volume above the volume that could be generated by most individual depository institutions, cost savings per transaction can be significant. The lower costs can be passed on to the customer and, in turn, result in an increased ability to attract customers. Thus, smaller institutions, through shared ATM networks, can compete with the larger institutions by providing reasonably priced ATM services.

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[1] According to a U.S. League survey of 700 representative Institutions, as of February, 1984, 27% of savings and loan associations were members of shared networks and another 19% were seriously considering becoming members by February, 1985.

[2] Bank Network News, 2 Network Directory 1 (1984). The survey selected the largest ATM networks based upon the volume of their monthly transactions.

The recent increase in participation by financial institutions indicates the attractiveness of shared ATM networks. Between the summer of 1982 and 1983, the number of shared ATMs in regional networks increased 45% to 16,000 and accounted for 40 percent of all ATMs in the country. More than 9000 financial institutions were members of regional shared networks. The 50 largest shared networks had a membership of 4760 depository institutions in 1983, including 497 savings and loans.[4]

Despite the participation of savings and loan institutions in shared ATMs, the vast majority, in fact 82% of the participants, are commercial banks. In the absence of S. 2898, or of a circuit court or Supreme Court decision overruling Marine Midland, many national and state member banks will be required to withdraw from these systems. Even though the Marine Midland decision is not legally binding outside the federal district of New York in which it was rendered, it creates a precedent which will likely freeze or decrease the number of shared networks. Higher transaction fees for the remaining institutions will result. While some of the higher costs may eventually be reduced by network consolidations, it will be much more difficult for a network to achieve the cost benefits generated by current national and state member bank participation. Moreover, the lack of national and state member bank participation in ATM networks will impede the development of more efficient, lower cost electronic funds transfer mechanisms. Given these considerations, the Bank Board believes that S. 2898 appropriately preserves the benefits of shared ATM networks.

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[3] Felgram, Shared ATM Newtorks: Market Structure and Public Policy, New England Economic Rev., Jan.-Feb. 1984, 23.

[4] Id.

You have also requested the Bank Board's comments on the Conference of State Bank Supervisors' ("CSBS") proposed amendment. That amendment would subject national and state member bank use of ATMs to state laws regarding the operation and location of ATMs. Unlike S. 2898, the CSBS amendment is not a return to the *status quo* before the Marine Midland decision. Rather, it could result in greater state restrictions on national and state member bank use of shared networks than under the Marine Midland decision. This amendment could severely curtail, rather than advance, shared network use by national and state member banks, and indirectly, by federally chartered savings and loans and other thrifts. The Bank Board considers this amendment to be harmful to consumers and depository institutions.

The CSBS amendment raises additional concerns because it refers to "pertinent state laws." This phrase could be misinterpreted to refer not only to state laws specifically relating to ATMs but also to state bank branching laws if the state law could be interpreted to define a branch to include an ATM. This provision could cause great confusion and litigation as currently drafted.

In conclusion, the Bank Board believes that shared ATM networks benefit consumers because they permit small- and medium-size depository institutions to offer the convenience of remote automated banking at reasonable costs. The Marine Midland precedent could prohibit further development of shared networks and could foster the disintegration of existing systems by causing withdrawal by commercial banks. The Board believes that a return to the law before the Marine Midland case is appropriate. S.2898, without the CSBS amendment, would accomplish this purpose.

I appreciate the opportunity to comment on S. 2898, and will be happy to answer any questions you may have.

Senator **Trible**. I thank you for your very positive testimony this morning.

Mr. Sebastian.

STATEMENT OF WENDELL SEBASTIAN, GENERAL COUNSEL, NATIONAL CREDIT UNION ADMINISTRATION

Mr. **Sebastian**. Good morning, Mr. Chairman. I will keep my remarks very brief in view of your lengthy agenda today.

In our judgment, the legislation you have proposed is necessary and welcome and should hopefully continue to provide the American people with a cost-efficient system of financial services delivery.

From the credit union perspective, as I'm sure you know but others may not, there are some 19,000 credit unions in the United States and a little over 70 percent of those are under $2 million in size. Some are much larger, but the vast majority are small and they would depend on a shared network to be able to provide these types of services to their members.

On the other end of the spectrum, there are some very large credit unions who have begun and are the principal stockholders of EFT systems, but they also depend on the participation of banks and savings and loans to make the economies of scale that they need for their systems to operate.

SEVENTY PERCENT OF SMALL CREDIT UNIONS ARE NOT IN ATM'S

I would say that the 70 percent of the small credit unions are not now in ATM systems but would hope to be, and it will be the continuation of the types of systems that are in existence today that will allow them to make it cost effective for them to get into those systems.

On the other hand, there are large credit unions—I have in mind Alaska, U.S.A. Federal Credit Union in Anchorage—that began an ATM system approximately 1 year ago. They have 28 ATM's up and working in the Anchorage area. But very significantly, they only own 51 percent of the company, the service corporation that operates and services those ATM's. The other 49 percent is owned by two of the major banks up there and two of the major S&L's.

If they were to be forced to pull out of the system, for whatever reason, it would become at least less cost effective and possibly impossible for them to continue those kinds of services.

An additional area of concern to the credit unions is the credit unions that we designate as Department of Defense credit unions. There are some 300 military credit unions based around the country that have overseas branches and in fact branches on aircraft carriers and things like that. It's not quite intergallactic, but they are certainly worldwide, and it would be in their best interest and the best interests of the military personnel around the world for them to be able to not only set up their own systems which they have the authority to do now, but DOD is interested in making all types of services available to its personnel, including banking and savings and loan type services, and so we would think that that would be an area where mandatory sharing or at least potential possible sharing of ATM systems would also be required.

As far as the amendment suggested by the Conference of State Bank Supervisors, put quite simply, we just don't see any need for that. The system is up and running quite well in our opinion and ought to be left alone.

For those reasons, we would support the legislation and urge you to do whatever you can to make sure that the potential effects of the *Marine Midland* decision are not wreaked on the rest of the country.

[The complete statement follows:]

TESTIMONY OF WENDELL A. SEBASTIAN, GENERAL COUNSEL, NATIONAL CREDIT UNION ADMINISTRATION

Mr. Chairman, members of the Committee, I am pleased to be here today to offer my views on S. 2898, the "Banking Convenience Act of 1984." In my judgment, this legislation is extremely important in ensuring the continued development of financial systems which will provide widespread financial convenience to all consumers and at the lowest possible cost. Certainly, the economies of scale of shared ATM networks are basic building blocks in the development of a financial system that can best serve an increasingly mobile society.

As this Committee knows, the National Credit Union Administration charters, supervises, and insures the 11,000 Federal credit unions in this country. In addition, we insure the accounts of approximately 5,000 state-chartered credit unions. Presently, there are 50 million Americans who avail themselves of the services of our nation's 19,000 credit unions. I am sure that eventually, the vast majority of these credit unions would like to be able to offer their members a method of remotely accessing their share accounts whether for information, cash withdrawal, bill paying, transfer between accounts, accessing a line of credit, or making a deposit.

Some credit unions presently have their own ATM. A very few have begun ATM systems. But the vast majority of credit unions will, of necessity, have to be participants in shared systems. This is due primarily to their size. Credit unions by far are the smallest sized category of financial institutions. In fact over 70% are under $2 million in assets. Sharing, therefore, is the name of the game for credit unions.

Mr. Chairman, in preparation for this hearing, I tried to learn of as much credit union participation in ATM networks as possible. This was done by contacting our regional offices, credit union trade associations, and researching EFT publications. Our agency does not collect specific information on ATM activities from the credit unions we supervise. Since 1980, Federal credit unions have been permitted to make their own decisions regarding the use of ATMs or participation in ATM networks. Prior to that, NCUA monitored credit union participation in a series of pilot programs. This former approach was adopted in 1974 at a time when EFT programs were developmental and little was known about their probable effect on participating credit unions. Based on the experience of this six-year period, the NCUA Board concluded that Federal credit unions would no longer need prior approval of shared or proprietary ATMs. To date this policy has caused no regulatory problems and has afforded Federal credit unions maximum flexibility in selecting and developing electronic financial systems best suited for their membership.

It was not possible for us to secure aggregate data on all credit union participation in shared ATM systems. However, there is little doubt that such participation is widespread and growing very rapidly. Our regions report that planning by credit unions for future participation is standard for all those located near existing local networks. Many other credit unions are exploring the advantages of the seven national networks including the possiblity of large scale credit union particpation in a single net. In one survey of 50 bank networks which I examined, there was credit union participation in approximately one-half of the networks.

Another area of widespread planning for ATM networks is occuring within the Department of Defense and concerns the many credit unions serving military installations across this country and overseas. Efforts are underway to permit military personnel to access their funds from any installation.

Some credit unions, such as Alaska USA, have started their own networks which are also shared by other financial institutions. The Alaska USA system, operating out of Anchorage, presently has 28 ATMs and includes two commercial banks among its members. With plans for significant expansion, this network indicated that it was important that the options for sharing between all types of financial institutions be maintained.

As another example of credit union participation in the ATM field, I would cite the Construction Employees Federal Credit Union of Peoria, Illinois which belongs to an ATM network with three credit unions, seven savings and loan associations, and 12 commercial banks. If the national banks had to drop out of the system, not only would the convenient locations of the banks be lost, but the costs to the remaining members would escalate prohibitively.

A communication on this subject from the Pennsylvania Credit Union League reveals that there are more than 30 credit unions in Pennsylvania which belong to a shared ATM network and many others have indicated interest in participating in the near future.

Most of these credit unions cannot afford to purchase an ATM and, therefore, greatly rely on ATMs owned by other institutions. Without shared systems, the League indicates that credit unions would experience great difficulty in planning for such future services as ATMs, point-of-sale, and home banking which are viewed as vital for future credit union members.

As far as credit unions are concerned, Mr. Chairman, the provisions of S. 2898 are extremely important; not only in terms of today's operations, but more importantly in keeping alive the dynamic nature of the planning for the future. The potential for only limited participation by national banks would seriously jeopardize the possibility of achieving cost effective ATM services for all consumers.

With respect to the changes proposed by the Conference of State Bank Supervisors, I am not aware of the need for such further restrictions as set forth in the proposed language. Unless there is a particular existing problem, of which I am not aware, then I would prefer to see enacted the present language of S. 2898.

This concludes my testimony. I will be glad to address any questions from the Committee.

Senator TRIBLE. Mr. Sebastian, I thank you very much.

We have been joined by my distinguished colleague from the State of Washington, Senator Gorton. Senator Gorton, would you care to ask questions of these witnesses?

Senator GORTON. No questions, Mr. Chairman.

Senator TRIBLE. Senator Gorton led our deliberations yesterday.

My questions have been fully anticipated by your testimony here today. I think you have demonstrated the far-reaching impact of this decision and have sketched the potentially adverse effects on a host of important activities. This decision could very well shrink, or decrease the number of, shared networks and, as you pointed out, that will retard technological development and the hopes for cost reduction in the days ahead and will have a very direct impact on smaller financial institutions and their ability to participate and provide these kinds of services. This is not just a banking matter in the narrow sense of that term, but affects a host of financial services provided by savings and loans and credit unions through shared ATM's as well.

So, gentlemen, I thank you for your presence today.

Mr. BRUMBAUGH. Thank you.

Mr. SEBASTIAN. Thank you.

Senator TRIBLE. The next panel consists of Mark Hannaford, president, Bank Card Holders of America; and Michelle Meier, director of government relations, Consumers Union. Since Mr. Hannaford is not here yet, why don't we just pass over this panel and we will go to the third panel. Let us begin with the third panel and then we will quickly move to our second panel.

Welcome, gentlemen. We have Hardy Nathan, director of government relations, Food Marketing Institute, and Phil Gasteyer, senior vice president and legislative counsel, U.S. League of Savings Institutions.

Gentlemen, you are most welcome. As you heard me say, your testimony will be made part of the record in its entirety and you are invited to summarize those remarks or give them all if you care to do so.

Mr. Nathan, you may proceed.

STATEMENT OF HARDY L. NATHAN, DIRECTOR OF GOVERNMENT RELATIONS, FOOD MARKETING INSTITUTE

Mr. NATHAN. Thank you, Senator.

I am Hardy Nathan, director of government relations of the Food Marketing Institute. I'd like to start off by saying that the food retailers do pride themselves on their roles as purchasing agents for the public. Because of this, we are an industry that is consumer driven. Many of the things you see happening in supermarkets now, the changes that are taking place in formats, larger stores, more services being offered, the emphasis on fresh produce, that type of thing, are all in response to the desires of consumers.

We spend a great deal of time and effort as a trade association, as well as individual companies, in finding out what the consumer wants and then trying to give it to them.

We operate on a very narrow margin so it's important that our member companies are right in their estimate of what customers want.

You see, for example, such things as the phenomenon of a small chain, Wegman's comes to mind, opening an 80,000-square-foot store which is bigger than anything we have in the Washington area, in a town as small as Canandaigua, NY, with a population of 10,500.

SUPERMARKETS' ROLE LIKE FRIENDLY NEIGHBORHOOD BANK

Allow me to point out, Mr. Chairman, that supermarkets have operated as though they were the friendly neighborhood bank for many decades. Long before the expansion of branch banking and debates about banking deregulation, it was at the supermarkets where shoppers cashed their paychecks, wrote a check for cash on the weekend, and paid for their purchases with a check for $25 more than the purchase cost. We have just completed a research project on the cost of handling checks and cash. It shows for an average supermarket doing a volume of $10 million annually, which is about the volume done in an average good sized store, 3,600 checks are cashed weekly. That's over 187,000 checks a year per store. Our members operate approximately 17,000 stores which means they cash about 3 billion checks a year. There are about 29,000 supermarkets in the United States altogether, using the generally accepted definition of the supermarket as a grocery store, that do over $2 million worth of business a year. So, as an industry, supermarkets cash over 5 billion checks a year.

The annual report of the Federal Reserve Board for 1983 indicates that if you exclude Government checks and postal orders, almost 16 billion checks were cleared in 1982. That means that approximately 32 percent of all the nongovernmental checks cashed in this country are cashed in supermarkets.

Our research further indicates the average check is written for $46. Without doing the multiplication, there's a lot of money involved in that.

It costs our members approximately 42 cents to handle each check transaction and all of this is done at essentially no charge to the customer. It's done because that's the service that the customers want.

In the last few years our customers have been telling us something new. They have told us that they like to do electronic banking while they are in their supermarket. The result has been predictable for a customer driven business. Our members have been installing all kinds of electronic equipment in their stores, many different kinds, many different varieties of ATM's, and increasingly are trying to develop point-of-sale networks.

The hardware may be owned by the retailer, by a bank, by a network, jointly owned, leased, rented, or simply given space in a store for a flat fee. The growth of the ATM machines has been phenomenal. In 1982, 4.5 percent of all supermarkets had ATM's in them. In 1983, the number had increased to 8.4 percent. We have an early indication that the rate of growth, if anything, is itself increasing. In certain areas, particularly in western Pennsylvania and Maryland, State retail grocer associations themselves are investigating the formation of ATM or POS networks.

The point is, this is an added service that our customers like. We offer it to them as an option. I'd like to emphasize that. It's not instead of check cashing; it is in addition to it. In fact, our research indicates that contrary to what some observers had predicted, the installation of an ATM in a supermarket does not necessarily reduce the volume or the amount of checks cashed in that store. We are keeping a close watch on this but the sampling is very clear on the point.

Now let me turn, if I may, specifically to the legislation at hand, S. 2898. I notice that the press and members of the panel refer to this as the *Marine Midland* case. You will understand if we refer to it as the Wegman case, as they are good members of FMI.

CUSTOMERS HAVE DEMONSTRATED STRONG PREFERENCE FOR ATM'S

It is not our intention to present either a legal or economic analysis of the district court's decision, nor will we discuss the underlying New York State law. What we are concerned about, and the reason that we strongly support and endorse this legislation, is that our customers have demonstrated a strong and growing preference for electronic banking services in supermarkets. The New York District Court ruling seriously jeopardizes the growth of this system and therefore we believe that S. 2898 is consumer legislation in the finest sense and we urge prompt favorable action on the bill.

The development of networks sponsored by many financial institutions is particularly important to the grocer. It is very difficult for us to offer a desirable service and then tell some of our customers that they're not allowed to avail themselves of it. As it is now, about 30 percent of customers have access to the average ATM machine in a supermarket. That is, they have the right card for that machine. That figure has to be substantially increased. For obvious reasons, we cannot have a variety of different machines in the store. The solution is the continued development of networks that will accept all cards. That very development will be thwarted by the Wegman decision.

I might add, Mr. Chairman, that in Washington State, there's been a happy combination of State law and enlightened leadership by both the banking and the retail community, and they are now in the process of setting up a system that's going to be available essentially to all of the shoppers in Washington State and many people are looking toward that development as a model.

Senator TRIBLE. Washington has long been known for its enlightened leadership, political and otherwise.

Senator GORTON. That's correct. I'm happy at the breadth of your view.

Mr. NATHAN. May I endorse both of those comments, Mr. Chairman.

It's important to emphasize that our industry's decision to enter the field of electronic banking was not made in a board room far removed from the marketplace. Rather, it was made in the marketplace. It does not seem appropriate to us to have that marketplace close down when it is expanding to the benefit of all consumers.

We have a situation also, Mr. Chairman, in which many of our members have invested a significant amount of money in the development of ATM networks. One of our member companies purchased all of their own machines and installed them in over 200 stores, stocked them with their cash, serviced them, created their own network, and own the switch. One would have to judge that a very substantial amount of money is involved. That factor of businessmen acting in good faith and allocating scarce resources to fulfilling consumer demand, argues in favor of this legislation.

You asked us in your letter, Mr. Chairman, which of two versions of S. 2898 we prefer. We believe that the original version as introduced by yourself is the stronger one. We think that the alternative would have somewhat ambiguous results, and therefore, we favor the version that you originally submitted.

I want to thank you for your leadership in this matter, Mr. Chairman, and if I may, I have a statement which has been sent to us from Mr. Robert Wegman, who is the chairman of the board of Wegman's Food Markets, and I'd like to offer that statement and have it included in full in the record.

Senator TRIBLE. Mr. Nathan, that statement will be made part of the record and I look forward to reading it.

[The complete statement follows, with the statement of Robert Wegman:]

STATEMENT OF HARDY L. NATHAN, DIRECTOR OF GOVERNMENT RELATIONS, FOOD MARKETING INSTITUTE

Good Morning, Mr. Chairman. I am Hardy Nathan, Director of Government Relations of the Food Marketing Institute. FMI, a non-profit association, conducts programs in research, education and public affairs on behalf of its more than 1,300 member companies and the customers they serve. FMI members are food retailers ranging from one store operators to the largest chains, voluntary wholesalers and cooperative wholesalers. More than three-fourths of FMI membership are independent supermarket operators. Our members, together operate, more than 17,000 retail food stores, and do in excess of $130 billion of business annually, half of all the food store sales in the Country.

Food retailers pride themselves on their role of purchasing agents for the public. Because of this, we are an industry that is consumer driven. FMI itself, through our consumer affairs department and our contact with consumer organizations as well as our research into consumer attitudes, constantly tries to keep abreast of our customers' desires and attitudes and the demographics of our business. In an industry in which a well run company may expect to net one penny of profit on each dollar of sales, a store cannot afford to be wrong very often or for very long about what the customer wants.

It's interesting to note that for the last two years our research indicates that speed at the check out counter is the number one concern of our shoppers and the single most important factor in their decision of where to shop. The second most important element is variety and a wide selection of products. Price is third, unlike our 1982 research which showed price as the most important factor at the time that inflation was still high.

So, you observe the experimentation with different types of services and store formats...warehouse stores, super stores, upscale stores, stores with bakeries, flower shops, delis, automatic teller machines, complete branch banks, full service sea food and gourmet meat counters and others too numerous to mention. You see the phenomenon of a small chain such as Wegmans Supermarkets open an 80,000 plus square foot store--bigger than anything we have here in Washington--in a town as small as Canandaigua, New York, with a population, of 10,500.

With this background about the grocery business, Mr. Chairman, allow me to point out that for most Americans, the supermarket has operated for decades as their friendly neighborhood bank. Long before the expansion of branch banking and debates about banking deregulation, it was at the supermarket where the shoppers cashed their paychecks, wrote a check for cash on the weekend, and paid for their purchases with a check for $25.00 more than the purchases cost.

FMI has just completed a major research project on the cost of handling checks and cash check cashing in the supermarket. It shows that for an average supermarket doing a volume of $10 million annually, which is about the volume done in an average store 3,600 checks are cashed weekly. That's 187,356 checks a year, per store. FMI members operate some 17,000 stores and that totals over 3 billion checks a year. There are about 29,000 supermarkets in the United States altogether, using the generally accepted definition of a supermarket as a grocery store doing a minimum of $2 million of business annually. So, as an industry, supermarkets cash 5.1 billion checks a year. The Annual Report of the Federal Reserve Board for 1983 indicates that, excluding U.S. government checks and U.S. Postal orders, 15.9 billion checks were cleared in 1982.

That means that approximately 32% of all non governmental checks cashed in this country are cashed in supermarkets. Our research further indicates the average check is written for $46. Without doing all of the multiplication, those are big numbers.

Our research shows that it costs an average of 42 cents to handle each check transaction. And all of this is done, let me emphasize, at no charge to the customer in most cases. It is done because that is the service the customers want.

In the last few years, our customers have been telling us something new. They have told us that they like to do electronic banking while they are in their supermarket. The result has been predictable for a customer driven business. Our members have been installing all sorts of electronic equipment, in many different modes, in response to the demand. Fully a quarter of our members have some sort of electronic equipment in their stores. They may be Automated Teller Machines (ATM), voucher systems, Point of Sale (POS) equipment. The hardware may be owned by the retailer, by a bank, by a network, jointly owned, leased, rented or simply given space in a store for a flat fee. The growth of automated teller machines has been phenomenal. In 1982, 4.5% of all supermarkets had ATM's in them. In 1983 the number had increased to 8.4%. We have an early indication that the rate of growth, if anything, is itself increasing. In certain areas, notably Pennsylvania and Maryland, state retail grocer associations themselves are investigating the formation of ATM or POS networks.

The point is, Mr. Chairman, that this is an added service our customers like. We offer it to them as an option. It is not instead of check cashing, it is in addition to it. In fact, our research indicates that contrary to what some observers had predicted, the installation of an ATM in a supermarket does not necessarily reduce the volume or the amount of checks cashed in that store. We are keeping a close watch on this but the sampling is very clear on the point. Let me add that supermarket operators and, I am sure, bankers as well, hope that our investment in EFT technology eventually does reduce the incidence, and so the cost of check handling.

Now, Mr. Chairman, let me turn specifically to the legislation at hand, S. 2898. I note the press refers to the underlying court decision as the Marine Midland case. We refer to it as the Wegmans case! It is not our intention to present legal or economic analysis of the district court's decision, nor will we discuss the rationale for the New York banking law involved. What we are concerned about, and the reason that we strongly support and endorse this legislation is that our customers have demonstrated a strong and growing preference for electronic banking services in supermarkets. The New York District Court ruling seriously threatens the continued ability of grocers to offer these services in their broadest and most desirable application to the public. Therefore, we believe S. 2898 is consumer legislation in the finest sense and we urge prompt favorable action on the bill.

The development of networks sponsored by many financial institutions is particularly important to the grocer. It is very difficult for us to offer a desirable service and then only make it available to some of our customers. As it is now, about 30% of customers have access to the average ATM machine in a supermarket. That is, they pocess a bank card that is ~~ex~~accepted by the machine. That figure must be substantially increased. For obvious reasons, we cannot have half a dozen different varieties of machines connected to many competing networks in each store. The solution is the continued development of networks that will accept all cards. But that is the very development that will be thwarted by the Wegman decision.

It is important to emphasize that our industry's decision to enter the field of electronic banking was not one made in a boardroom far removed from the market place. It was made, rather, in the marketplace. It does not seem appropriate to us to have that marketplace closed down when it is expanding to the benefit of all of the participants.

As you know Mr. Chairman, it was a ruling by the Comptroller of the Currency that helped to contribute to the growth of ATM networks. It led to the realization by many grocers that shared networks were the way of the future. Many invested in what they felt would serve the needs of their customers. Many companies including many small independent grocers made significant investments in both hardware and software. In fact, one company purchased all of their own machines, installed them in over 200 stores, stocked them with their cash, serviced them, created their own network, and they own the switch. One would have to judge that a substantial investment is involved. That factor also -- that businessmen acting in good faith have allocated scarce resources to fulfilling consumer demand -- argues in favor of this legislation.

In the letter in which you invited FMI to testify at these hearings, you enclosed two versions of S. 2898 and requested comment on them. First, as I have indicated, we believe the overturn of the Wegman decision will result in the continuation of the growth of ATM and POS networks. We think this will happen in an orderly fashion and will be responsive to consumers demands. The structure that will eventually develop is best found by marketplace forces and should, as much as possible, be defined without governmental interference. For example, the relationship between food retailers and bankers has not always been smooth and currently shows some signs of stress. However, we feel that it is best for us to work out our relationships in such areas as ATM and POS fees on an even playing field with a minimum federal presence.

Second, you asked which version of S. 2898 we prefer. The two texts are very similar, Mr. Chairman, but we believe that the original version drafted by Senator Trible appears to be more direct and less apt to ambiguous interpretation. We favor if for that reason.

Finally, Mr. Chairman, let me say a public word of thanks to Senators Trible and Humphrey. Their leadership on this important consumer issue is appreciated. We are also grateful to Senator Garn for scheduling the hearings. We hope, even this late in the session, that the committee will complete its work on S. 2898 and report it favorably to the full Senate. I thank you for your considerate attention and will try to answer any questions you have.

STATEMENT OF ROBERT B. WEGMAN, the Chairman of the Board Wegmans Food Markets, Inc. in support of S. 2898

Thank you for this opportunity to submit this statement to the Senate Banking Committee in support of the Trible-Humphrey Bill, S.2898. I am the Chairman of the Board of Wegmans Food Markets, Inc., a grocery retailer with its headquarters office in Rochester, New York and stores at more than thirty locations in upstate New York. Wegmans is the co-defendant with Marine Midland Bank, Inc. in the case of *Independent Bankers Association of New York State, Inc. and The Canandaigua National Bank and Trust Company, v The Marine Midland Bank, N.A. and Wegmans Food Markets, Inc.*(the "Marine Midland Case").

The District Court decision in the Marine Midland Case, issued April 6, 1984, has undermined the foundations of the entire automatic teller machine ("ATM") industry. The availability of banking services via ATM at the marketplace is now so widely accepted by the public that any impairment of ATM services constitutes a major setback to consumers and to the retailers' ability to provide efficient customer service.

The District Court held, contrary to the position of the Comptroller of the Currency, that the mere sharing of another parties' ATM by a national bank constitutes branch banking, subjecting that bank to whatever restrictions on branching exist under applicable state law. The legal basis of this decision is, of course, being challenged on appeal. I wish to discuss the practical impact of the decision on Wegmans because it illustrates the illogical effect of applying out-dated branch banking concepts and restrictions to modern electronic banking techniques. The result of the Marine Midland case shows clearly that the remedy of S. 2898 is sorely needed.

Retail grocery stores have provided the ideal location for marketplace ATM's. The grocer's incentive is twofold. First, the providing of ATM access to a broad range of financial institutions is a significant customer attraction. Stores offering ATM access to a network of financial institutions have a distinct competitive advantage over stores offering only limited or no ATM service.

ATM systems and similar electronic banking systems are also of direct importance to retail merchants in providing a secure, efficient payment mechanism. Ours is not yet a "cashless society", but the operation of any retail business on a cash-only basis is, by any standard, obsolete. Credit card systems and check verification systems have evolved, but shared ATM systems and the developing "point of sale" systems constitute far more effective payment mechanisms.

In early 1983 Wegmans, following the lead of other retailers, decided to establish its own network of ATM machines. A primary reason for this decision is Wegmans belief that it can provide better quality and broader service than could be provided by several other ATM networks, each representing a different group of banks.

Wegmans' objective was and is to attract the maximum number of financial institutions, large and small, to its system. Thus, Wegmans contracted with both the existing Metroteller and HarMony Systems to participate in Wegmans ATM program, and it is also free to contract with other financial institutions.

At the time the litigation against Marine Midland and Wegmans was commenced (August 1983) users of the Wegmans ATM system included Marine Midland, Manufacturers Hanover, N.A., Salemanca Trust Company and the Griffiss-Oneida Credit Union. We projected that by the end of 1984 not less than 23 financial institutions would participate in the Wegmans ATM system.

Having found that under federal law the usage of the Wegmans ATM in Canandaigua constituted branch banking by Marine Midland, the District Court then looked to New York State law to determine if the branch could lawfully be established by a state bank. Under the home office protection provision of the New York banking law, no state or federally chartered bank can branch into Canandaigua which is the home office of the Canandiagua National Bank and Trust Company, one of the plaintiffs in the action. Thus, the court enjoined the customers of Marine Midland from using the Canandaigua ATM. As to the ATMs located in other retail locations, usage by Marine Midland and other participating banks has continued, but with some degree of uncertainty as to whether branch approval must be obtained from the Controller. The Canandaigua ATM is now only available for usage by the customers of certain participating federal thrift institutions and credit unions since their ATM operations are not subject to branch restrictions.

Canandaigua is a community of approximately 12,000 with a substantial seasonal population of persons owning cottages and camps in the Finger Lakes and Bristol Hills area. The area supports an 80,000 plus square foot grocery store--a big facility by any measure. We believe that a majority of our customers at Canandaigua have primary banking relations with banks other than the Canandaigua National Bank and Trust Company. However, as a result of the District Court decision our customers in Canandaigua cannot use our ATM to transact banking business with any of the major commercial banks or state chartered thrift institutions serving the area. Indeed, our ATM facility in that store has been rendered useless for the great majority of our customers.

The economic effect of treating shared usage of ATMs as branch banking is to preserve the state law monopoly of The Canandaigua National Bank, but at considerable sacrifice of banking services to the public. Whatever the history behind "home office protection", this result is highly undesirable to those who really count - consumers in the marketplace. The effect of S. 2898 would be directly the opposite of this undesirable result - banks would be secure in participating in the ATM systems established by others. In our case, enactment of S. 2898 would mean that our Canandaigua store could again offer ATM access to Marine Midland and any other bank that agrees to participate, including The Canandaigua National Bank and Trust Company.

In other parts of the United States, the impact of S. 2898 would be even more vivid. Uncertainty as to the ability of national banks to offer their customers ATM access over state lines or within unit banking states would be eliminated. The path would then be clear for the development of modern electronic banking to its full potential.

There is no reason why a bank's participation in a shared ATM system need be regarded as the conduct of a banking business at branch locations. The only advocates of this result that we have encountered are other financial institutions with some vested interest, attacking ATM systems as an intrusion on their protected turf. Modern technology has provided means of accessing banking services without requiring the customer to visit the bank in person. The need for such access by electronic means is strong. It can be fulfilled by ATM systems and the broad range of more sophisticated electronic banking facilities now in the planning stages. Enactment of S. 2898 will settle the issue which now threatens this development.

Senator Trible. I want to again welcome you here today. You served for many years on Capitol Hill yourself, and I recognize that distinguished service, as administrative assistant to Senator Brooke of Massachusetts, and I know he served as a member of this committee. So you have been long involved in those issues affecting the financial services industry and so your testimony today has special weight.

Mr. Gasteyer, please proceed.

STATEMENT OF PHIL GASTEYER, SENIOR VICE PRESIDENT AND LEGISLATIVE COUNSEL, U.S. LEAGUE OF SAVINGS INSTITUTIONS

Mr. Gasteyer. Thank you, Mr. Chairman. I am Phil Gasteyer, legislative counsel for the U.S. League of Savings Institutions here in Washington.

The league supports S. 2898 and asks for its passage by this Congress. Frankly, Senator Trible, your statement—and explanation both today and in the Congressional Record—was persuasive with us.

Senator Trible. Say no more, Mr. Gasteyer. Say no more. Thank you very much.

NEED TO RETURN TO THE STATUS QUO

Mr. Gasteyer. Our primary interest in this legislation is to return to the status quo and avoid potential disruption in the shared ATM networks created by the district court decision in New York. As Mr. Brumbaugh explained earlier, savings institutions participate in many of the regional and other ATM networks spreading across the Nation.

Without national bank participation, some of those networks no doubt will be dismantled and, in others, the remaining thrifts and nonmember State-chartered banks will be faced with higher user fees.

Our laws and regulations clearly permit regional or interstate participation by federally chartered thrift institutions in shared ATM networks. In dealing with the issue before you today, we strongly urge that no change be made in the statutory or regulatory framework for savings institutions' remote service units. That is, if the language of the bill is somehow modified—and, of course, we're not suggesting that it should be modified.

The U.S. League cannot support the additional language proposed for S. 2898 by the Conference of State Bank Supervisors. It appears to us to prejudge some of the broader and very complex issues regarding the McFadden Act and the Douglas amendment, a review that we would recommend be postponed until another Congress.

It is also our understanding that you, Senator Trible, intend by this limited legislation simply to restore the status quo, not to somehow or other expand the functions performed for national bank customers at the shared ATM terminals. We would hope that that point be made clear in the surrounding legislative history.

I appreciate this opportunity to present our views and would be happy to answer any questions.

[The complete statement follows:]

Statement of Phil Gasteyer
On Behalf of the U.S. League of Savings Institutions
To the Senate Committee on Banking, Housing & Urban Affairs
Regarding S.2898, The Banking Convenience Act

MR. CHAIRMAN:

My name is Phil Gasteyer of Washington, D.C.. I am a Senior Vice President and Legislative Counsel for the Washington Office of the United States League of Savings Institutions and appear today on behalf of the League and its 3,500 member institutions nationwide.

The League is pleased to express its general support for S.2898, the Banking Convenience Act, introduced by Senators Trible and Humphrey of this distinguished Committee.

As we understand it, S.2898 is intended to restore the status quo prior to a decision on April 6, 1984 in the U.S. District Court for the Western District of New York declaring that participation by a national bank in a shared automated teller machine (ATM) network located in supermarket chain stores constituted a "branch" subject to the geographical restrictions on branching by commercial banks (Independent Bankers Association of New York State v. Marine Midland Bank, N.A. and Wegman's Food Markets, 583 Fed. Supp. 1042). The proposed legislation would reaffirm that when an "automated device" is not "established" -- that is owned or rented -- by a national bank, the bank is not restricted by State branching laws through the application of the McFadden Act. This definitional approach is consistent with a 1976 appellate decision which held mere use of an ATM by a bank's customers did not constitute establishment of a branch, subject to the geographical restrictions on bank branching.

Our primary interest in this legislation is to restore the status quo and avoid the potential disruption in shared ATM networks created by the District Court decision. Regional, shared ATM networks are increasingly popular with the public because of the convenience they provide in making withdrawals and deposits and transferring funds among accounts twenty-four hours a day and at locations distant from financial institution offices.

Though I do not have precise data to share with the Committee, federal and State-chartered savings institutions of all sizes participate in many of the networks now available and their customers enjoy this innovation in service. An informal survey of several hundred savings institutions by one of our affiliated organizations indicated recently that more than half of the respondents either were participating now in a shared ATM network or were contemplating joining such a network.

If the District Court decision is not negated by Congressional action (or reversed by the courts), the popularity and appeal of these new banking services would be diminished -- since there would be fewer eligible participants and therefore less interest from third parties (such as the New York supermarket chain) in establishing such services at their locations. Without national bank participation, it is reasonable to assume that some existing networks will be dismantled or that savings institutions will be faced with increased user fees when making such services available to their customers.

Current law and regulation for federally-chartered thrifts differs somewhat from the statutory restraints on national banks. Savings institutions are not bound by the McFadden Act, though in practice the Federal Home Loan Bank Board has adhered historically to the deference that statute shows to State policies on branching. The only limitation on interstate branching currently imposed by section 5(r) of the Home Owners' Loan Act involves compliance with the tax law's asset-composition test (with exceptions for branches acquired through emergency supervisory mergers and under reciprocal State laws). Furthermore, section 545.141(a)(3) of the Federal Home Loan Bank Board's rules declares unequivocally that a "remote service unit" (the savings institution jargon for ATM) "is not a branch, satellite, or other type of facility or agency of a Federal association". In addition, subsection (b) of that rule declares that "a Federal association may establish or use remote service units and participate with others in RSU operations on an unrestricted geographic basis". This authority, however, may not be used to open a savings or demand account or establish a loan account. Section 304 of the Depository Institutions Deregulation and Monetary Control Act of 1980, developed in part by this distinguished Committee, expressly authorized the establishment of remote service units "for the purpose of crediting savings accounts, debiting such accounts, crediting payments on loans, and the disposition of related financial transactions".

Thus, it is clear that participation in a shared ATM network within a State, or on a regional or interstate basis, is perfectly permissible for federally-chartered savings institutions. In dealing with the issue before you today, we would strongly urge that no change be made in the existing laws or regulations governing remote service units and their geographical dispersion under existing laws and and the rules of the Federal Home Loan Bank Board. The U.S. League would have to oppose any legislation imposing any new restrictions on remote service units by federally-chartered thrifts in the course of remedying the problems created by the U.S.District Court decision affecting the ability of national banks to provide shared ATM network services to their customers.

In your gracious invitation to testify, Mr. Chairman, you asked us to address the changes in the language of S.2898 recommended by the Conference of State Bank Supervisors. CSBS would amend the language to subject shared national bank ATMs to "all pertinent State laws regarding location, ownership, operation and permissible functions". The U.S. League cannot support such a change. It appears to us to prejudge some of the complicated issues regarding the McFadden Act in the modern financial services marketplace. We would recommend that you postpone that much larger subject until another Congress, when there is greater opportunity for careful review. The CSBS language is not necessary to solve the present, more limited problem in ATM sharing created by the District Court's April decision.

On another matter, we repeat our understanding that the intent of this Trible-Humphrey bill is to restore the status quo, not to expand authority for the functions performed at automated teller machines. As mentioned above, the Congress in 1980 very precisely spelled out the operations available at the remote service units used by customers of federally-chartered savings institutions. Similarly, we would recommend that appropriate legislative history for S.2898 indicate that the definitions are not intended to expand in any way the functions performed for national bank customers beyond those found in existing law. This clarification would assure that comparability of service would be maintained among the various institutions offering shared ATM facilities.

As a final note, we are uncertain whether the language of S.2898 affects the ability of national banks to own a regional or national network "switch", one of the intermediate processing facilities between the customer's electronic instruction and his or her depository institution. We have no objection to such switch ownership by a national bank. It might be helpful to discuss this question in any accompanying legislative history to deter a new line of judicial intervention with ongoing networks and their services to the public.

In conclusion, I repeat the support of our organization for S.2898 and urge its approval by your Committee and the 98th Congress before it adjourns.

Senator TRIBLE. Well, I thank you both for being here today and I defer to my distinguished senior colleague for questions.

Senator GORTON. No questions, Mr. Chairman.

THE POINT-OF-SALE SYSTEM

Senator TRIBLE. I would just like, Mr. Nathan, to ask you to flesh out for the record what is a point-of-sale [POS] system?

Mr. NATHAN. This simply would be a debit card that could be used at the checkout counter instead of either cash or a check. There is a great deal of talk about POS in supermarkets, but in spite of the fact that there's a lot of talk about it, the actual use of them has been extremely limited.

Probably the prime example of POS in supermarkets is in the Des Moines, IA area where the Hy-Vee Food Stores, which is the leading food retailer in the State of Iowa, for a number of years has had POS equipment in a store. It's simply a card that looks like a credit card but is a debit card. After the sale is totaled up in the normal way with scanners, the card is run through a reader, a PIN number is punched in much as you would do at the ATM at your bank, and the money is automatically debited from your account and credited to the account of the store.

The thinking in our industry is that this is the direction that will be taken in the supermarket industry, that we will continue to have ATM machines, but that the real impact of electronic banking in the supermarket will be through POS equipment.

Part of the reason is that POS will have an impact on the efficiency and the productivity of the front-ended stores because it will be much faster than either paying in cash or by check and what our operators are always looking to do is to reduce costs in the store.

Senator TRIBLE. I have always heard that the profit margin in the grocery business is a very narrow one. I have often heard people say a penny for $1. Is that roughly accurate?

Mr. NATHAN. If you're doing a good job, that's accurate. If you're wrong very often or if you aren't alert to changes in the demographics of your area or the wants of your customers, then you wish that you could make a penny on the dollar. I think one only has to look at the list of the 20 leading chains, for example, in the United States of 20 years ago and compare it with the list today and you will see that there's been a very, very significant change in the makeup of the leading stores.

There was an article, I believe a cover article, in Forbes magazine this month which is on the subject of supermarkets. It pointed out how independent operators, because they are more able to react quickly and are more in tune with what's going on in their marketplace, in many areas of the country are doing a much better job than the chains.

So it is an extremely competitive business and one with very, very narrow margins. You're absolutely right, sir.

Senator TRIBLE. Well, obviously those marketplace realities influence your industry to look to broader services and that's why you're here today, and I think your description of the point-of-sale system and its application to the operations of grocery stores and other kinds of retail facilities demonstrates again that we need to encourage electronic banking and technological development and we ought not to discourage those kinds of activities.

Mr. Gasteyer, at some point I'd like to have the benefit of your ideas about how we can generally encourage the development of these new technological services and ATM's in particular. This is not the vehicle or the time, but I look forward to that opportunity and I thank you both for being here today.

Mr. **Nathan**. Thank you.

Mr. **Gasteyer**. Thank you, Senator.

Senator **Trible**. Our next panel includes Michelle Meier, director of government relations, Consumers Union; and Mark Hannaford, my former colleague in the House of Representatives, now president of the Bank Card Holders of America. You are both most welcome. We are going to reverse protocol and call on Michelle Meier first since she was here and waiting most patiently. We thank you both for being here today.

STATEMENT OF MICHELLE MEIER, DIRECTOR OF GOVERNMENT RELATIONS, CONSUMERS UNION

Ms. **Meier**. Thank you, Senator Trible.

Senators Trible and Gorton, thank you for holding these hearings. Generally, Consumers Union favors S. 2898 or at least the general purpose of reversing the *Marine Midland* decision. However, Consumers Union in considering the consumer interests in the development of ATM's throughout the United States believes that it is important to go beyond the changes made to the McFadden Act in S. 2898. I will go on later to explain exactly how I feel S. 2898 modifies the McFadden Act and the pre-*Marine Midland* status quo, which I feel it does.

ANALYSIS OF PRESENT LAWS ON ATM'S

However, before doing that, I would like to present in preparation my analysis of the confusing morass of laws that affect the development of ATM's in the United States. As a premise, I would simply like to state that for consumers, from the consumers perspective, unrestricted development of ATM's is most preferable. Hence, the need to look at the laws governing the development at this time.

First, we have the McFadden Act, which as anyone knows leaves to the States the decision as to whether national banks may branch within the States. Pursuant to the McFadden Act, we have the Comptroller's regulation which was promulgated in an attempt to conform the regulation to a 1976 District of Columbia District Court decision interpreting the McFadden Act.

That regulation, as far as we are concerned, unreasonably classifies ATM's into two categories. First, there are proprietary ATM's which under the Comptroller's regulation are deemed to be branches and subject to State branching laws. In other words, the Comptroller's regulation prevents a national bank in State "A" from establishing a proprietary ATM in the same State if the branching laws prohibit branching in that State.

The second classification of ATM's in the Comptroller's regulation are nonproprietary ATM's. Inexplicitly, the Comptroller's regulation excludes these ATM's from the definition of branches for McFadden Act purposes. However, the regulation does not state that national banks may establish these nonproprietary ATM's, these shared ATM's, regardless of State law restrictions. This is the crucial distinction between the Comptroller's regulation which represents the pre-*Marine Midland* status quo and the Trible bill, S. 2898, and I will get back to that in a minute.

Now it's important to look at the patchwork of State law which affects ATM's. Most of this information was gotten from the Conference of State Bank Supervisors in its survey of State legislation.

Thirteen States place geographic location limits on ATM's. Many of those limits are countywide limits. Several States prohibit in-State bank customers from accessing their accounts out of State through ATM's located out of State. The majority of States prohibit out-of-State banks from establishing ATM's within their States and, amazingly, several States do not even allow banks located within their borders to share ATM's with banks located outside of their borders.

Consequently, the liberal attitude the Comptroller's regulation reflects regarding shared ATM's is inhibited by all these State laws.

Additionally, most States—the majority of States—require that ATM networks within the States be shared with any financial institution that would like to share them. There are strong antitrust considerations which argue against this type of mandatory sharing requirement on an across-the-board basis.

My conversations with persons responsible for interpreting and enforcing the Comptroller's regulation in the Comptroller's Office itself lead me to conclude that, in spite of the Comptroller's regulation and actually because of it, because of its only implicit endorsement of nonproprietary ATM's, my conclusion is that most networks are complying with these State law requirements. A major reason they are complying with these State law limitations is that the McFadden Act at the present time offers weak grounds for arguing that the Federal Government may preempt State law as to the development of ATM's.

We believe it is in the consumers interest to have unrestricted development of ATM's, which is not permitted by the State law inhibitions and the weakness of the McFadden Act as to preemptive Federal authority, because ATM's offer convenience in many ways to consumers and offer a more competitive environment.

CONSUMER IS NOT RESTRICTED BY TIME

First, the consumer is not restricted by time because of ATM's. He can access an ATM on a 24-hour basis.

Additionally, a consumer can go to a supermarket, to several alternative locations, other than the brick and mortar branch, to access his account. Aside from the convenience of the ATM itself, the unlimited development of ATM's is important because it makes for a more competitive local banking environment. The traditional 10-to-3 banking hours have traditionally limited consumers to choosing a bank that is within a short radius of their place of business or work. With ATM's, that limiting choice impediment is no longer so applicable, so the consumers have a broader choice of banks with which they may reasonably choose to bank with.

And finally, there are potential cost advantages to ATM's that may be passed on to the consumers.

As I've mentioned, the source of the problem is the McFadden Act which provides no clear Federal preemption over State ATM laws.

The *Marine Midland* decision exacerbates the pre-*Marine Midland* status quo by requiring all ATM's to be classified as branches. Unfortunately, ATM's do not function quite like branches, so the competitive equality theory that is incorporated in the McFadden Act should not apply to ATM's.

Why don't ATM's function like branches? Well, on one hand, I have stated that consumers have a broader range of choice in choosing a financial institution because of the development of ATM's and the freedom from geographic restrictions. That is only true as to the local market. It is very unlikely that a consumer will choose to set up an account in a bank located several miles away or with brick and mortar facilities only located in another city or outside of the local community.

Consumers generally have the need to deal face-to-face with their financial institution, so that the ATM provides convenience but will not attract consumers to out-of-State banks or to out-of-metropolitan-area banks. There will be no drastic restructuring of the banking industry due to a free development of ATM's.

S. 2898 reverses *Marine Midland* by endorsing in an affirmative way the authority of national banks to establish shared ATM systems and to permit their customers to use these shared systems.

It is also, in our view, positive in improving the pre-*Marine Midland* status quo simply because it affirmatively establishes this right of national banks. I do think it is important to decide if we want to modify the pre-*Marine Midland* status quo or not because frequently the issue of whether Federal law preempts State law is a matter of congressional intent at the time the law is passed.

Consumers Union definitely favors presenting the Trible bill, S. 2898, this amendment to the McFadden Act, as a slight modification of the pre-*Marine Midland* status quo, preempting State restrictions on the free development of ATM's.

Unfortunately, the status quo is preserved by S. 2898 in perpetuating the classification of proprietary ATM's as branches. It makes no sense to us to distinguish between proprietary and nonproprietary ATM's when determining whether they are branches. Consumers receive equal benefits regardless of whether its bank owns the ATM or is merely sharing the ATM. And again, in line with my analysis as to the need for consumers to have face-to-face contact with their banks, ATM's set up on either a proprietary or nonproprietary basis will not function like branches.

As to the CSBS amendment, first of all, I think that the first amendment which inserts a clause requiring national bank ATM establishment to be governed by State laws speaks to the fact that at least the Conference of State Bank Supervisors believes that the amendment or the bill modifies the pre-*Marine Midland* status quo. Because we are in favor of that modification, we oppose the CSBS amendment.

The second CSBS proposed amendment merely addresses the distinction between proprietary and nonproprietary ATM's, which we feel is totally unnecessary and therefore we also oppose that amendment.

DOWNSIDE POINT OF ATM DEVELOPMENT

Finally, I believe that although ATM development should be unrestricted in terms of placement and ownership, there is from the consumers' standpoint, or at least from a certain category of consumers' standpoint, a downside associated with the ATM development.

In recent years there have been a number of branch closings, particularly in low-income areas. These branches are frequently replaced by ATM's. As I mentioned earlier, an ATM cannot function in the place of a live teller all the time. Occasional contact with a live teller is necessary for most consumers, and I would hope that this issue of accelerated branch closings and replacement by ATM systems would be addressed by the Congress sometime early next year.

Thank you very much.

[The complete statement follows:]

STATEMENT OF

MICHELLE MEIER
COUNSEL FOR GOVERNMENT AFFAIRS

WASHINGTON OFFICE
CONSUMERS UNION OF U.S., INC.

Consumers Union* greatly appreciates the opportunity to bring to the committee's attention the consumer's perspective on S. 2898 and the future development of automated teller machines (ATMs) in the United States. While we support the general direction of the bill, we strongly believe it should go further to authorize the unrestricted development of ATMs by nati~~onal~~ banks.

INTRODUCTION

In recent years, the growth of (ATMs) has skyrocketed. In 1970, there were approximately 18 installed ATMs throughout the United States. One observer estimates that at the end of 1983 approximately 38,000 ATMs had been installed and that 54,000 ATMs would be installed by the close of 1984.**

Further, many financial institutions have established or joined statewide, regional and/or national networks, through which they are able to offer their customers access to their own proprietary ATMs or to the shared ATMs of other institutions. At the present time there are 7 national and approximately 200 regional ATM networks.

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*Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications, and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with approximately 3 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

**H.S. Nilson, ATMs Worldwide: The Nilson Report Annual Summary of Automated Teller Machines and Debit Cards at A-8 (3d ed. 1984).

CONSUMER CONVENIENCE

For the consumer, these figures reflect added convenience. Many ATMs operate on a 24 hour basis, allowing consumers to perform routine banking transactions on their own time schedules. As a result of the growth of ATM networks, consumers are provided both time and geographic flexibility. To access their accounts, they are no longer limited to their own financial institutions' brick and mortar facilities. Rather, in addition to those offices, they may access their accounts at shopping centers, supermarkets and other locations if the need for "quick cash" arises.

ENHANCED COMPETITION

The added service provided by ATMs located both on and off the premises of a financial institution offers not only a convenience in itself but a quantum leap forward in the degree of competitiveness in the banking industry. Because of the development of both proprietary and shared ATM networks, a financial institution will not necessarily enjoy the assurance of a captive customer base merely because its brick and mortar facilities are located, for example, in the center of a lively business district. In a freely developed ATM market those who work in the business district may choose from among several alternative institutions that own or share one or more networks of conveniently located ATMs. To attract the deposits of those who live or work in the area, all of these institutions, not just the few with brick and mortar offices, will compete with one another in a more vigorously competitive local market.

In other words, the 10 to 3 o'clock banking hours have traditionally forced consumers to choose a financial institution with offices located within a short distance from home or work. Without this overiding limitation, consumers are free to compare institutions on the basis of a full range of product and service offerings.

COST SAVINGS

Finally, consumers may also benefit from the unimpeded development of ATM networks because the cost savings they are expected to provide member financial institutions will potentially be passed on to them. After finally winning the right to earn market interest rates on their savings, consumers of basic banking services are now being hit with extraordinary service fees, penalty charges, and minimum eligibility requirements. As financial institutions realize the anticipated cost savings of replacing human tellers with computers, those cost savings should be passed on to consumers. Hopefully, competitive market forces will produce this result.

APPLICABLE LAWS AND REGULATIONS

The present state of development of ATM networks has occurred in spite of, rather than because of, a confusing body of federal and state laws. Primary among these laws is section 7 of the McFadden Act,[1/] which permits national banks to establish branches within a particular state only to the extent branching is permissible under state law.

In an apparent attempt to conform its regulations with a 1976 court decision[2/] interpreting section 7, in 1982 the Office of the Comptroller formally issued a regulation that only identifies as branches those ATMs that are either owned or rented by a financial institution. Under the regulation,[3/] a bank in State A can not own or rent an ATM in State B unless the branching laws of State B specifically allow banks of State A to establish branches there. A bank in State A may not even own or rent an ATM within the same state if the state has unitary branching laws or other branching restrictions, such as home office protection laws.

In an apparent attempt to stretch judicial interpretation to the limits of propriety, the Comptroller's regulation implicitly excludes a class of ATMs from the definition of a branch within the meaning of the McFadden Act. This exempted

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[1/] 12 U.S.C. Section 36.

[2/] IBAA v. Smith, 534 F.2d 921 (D.C. Cir.), cert. denied sub nom., Bloom v. IBAA, 429 U.S. 862 (1976)

[3/] 12 C.F.R. Section 5.31 (1984).

class includes those ATMs not owned or rented by a national bank but used, frequently on a transactional fee basis, by the national bank's customers. No explicit provision in the federal regulation, however, explicitly authorizes national banks to use these shared ATMs without regard to state restrictions.

Although the Comptroller's regulation implicitly permits these sharing arrangements and operates under a general policy of allowing unrestricted proprietary ATM "branching" in those states where branching is allowed, many states have enacted laws that specifically restrict the location and permissible functions of ATMs. According to one authority,[4] approximately thirty eight states have EFT statutes. Approximately 13 states regulate the permissible in-state geographic areas in which an ATM may be established. For example, several states have enacted county-wide ATM placement limitations.

Aside from these restrictions on in-state geographic ATM placements, a patchwork of state laws limits the ability of financial institutions to permit their customers to access their accounts through ATMs located out-of-state. Further, a majority of states prohibit out-of-state banks from placing

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[4] Conference of State Bank Supervisors, A Profile of State Chartered Banks (10th ed. Jan. 1984). All of the information in the text regarding state laws affecting ATMs is taken from this source.

ATMs inside their boundaries. A smaller but significant number of states do not allow banks located within their borders to share their ATM terminals with out-of-state banks.

Curiously, the applicability of federal preemption principles to these diverse and inconsistent state laws has never been litigated or formally addressed by the Comptroller. A reasonable explanation, which our organizaton has not been able to confirm, is that most ATM networks are complying with them in spite of the Comptroller's regulation because only a weak federal preemption argument is possible given the present language and judicial interpretation of the McFadden Act.

IMPEDIMENTS TO ATM GROWTH

These state restrictions and the lack of a preemptive federal law permitting national banks to establish ATMs on a proprietary or shared basis create a strong impediment to the development of ATM systems. The industry must incur unnecessary legal costs in complying with a patchwork of 52 laws. Further, because of state ATM restriction, the industry must forego service expansions, which involves lost opportunity costs. Not only are these costs likely to be passed on to consumers, but consumers will suffer from less competition in the banking industry and the lesser availability of the conveniences provided by the unrestricted development of ATM networks.

Even more important and timely is the confusion and developmental barriers caused by the language and judicial interpretation of the McFadden Act itself. As the committee is no doubt aware, the present branching provisions of the McFadden Act became law in 1933, when the notion of electronic banking was far from the minds of the nation's policy makers. To accommodate competitive equality between state and federal banks, the McFadden Act leaves it to the individual states to determine whether a national bank may branch. The recent district court decision in New York, _IBAA of New York, Inc. v. Marine Midland Bank, N.A., et al._[5] brings to the fore the question of the necessity and wisdom of allowing the states to control the development of the ATM industry.

The _Marine Midland_ decision reverses the Comptroller's position on the establishment of nonproprietary ATM systems. By classifying these systems as branches within the meaning of the McFadden Act, the decision allows the branching laws of the individual states to determine the legality of ATM development. Before the _Marine Midland_ decision, the development of ATMs was fostered by a liberal interpretation of federal law but impeded by a proliferation of inconsistent state laws specifically addressing ATMs. The _Marine Midland_ decision creates a new problem in connection with unrestricted ATM development. By classifying both proprietary and nonproprietary ATMs as branches, the Marine Midland decision leaves the Comptroller no authority to endorse the unrestricted development of shared ATMs. Rather, he can only permit their establishment in any particular area if state branching laws allow branching in the same area.

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[5] _IBAA et al v. Marine Midland Bank and Wegman's Food Markets, Inc._, (Doc. No. Civ. 83-1006T)(1984).

This interpretation of the McFadden Act, which may be unavoidable given the language of the Act, has two adverse effects. First, it will require all institutions that use shared ATM terminals to terminate any sharing arrangements if state branching laws would prohibit the establishment of a branch in the same location. Second, it allows state branching laws to determine the placement and functions of ATM terminals, even through ATMs do not necessarily function like brick and mortar branch offices.

AMENDING THE MCFADDEN ACT - RECOMMENDATIONS

Consumers Union believes that consumers will best be served by a federal law that explicitly allows national banks to establish ATMs without geographic, functional or ownership limitations and without regard to the same type of limitation imposed by the individual states.

The present Comptroller regulation, which S. 2898 is purportedly designed to preserve as law in the wake of the Marine Midland decision, perpetuates an impractical and unnecessary distinction between the status of ATMs owned or rented by a national bank, and ATMs merely accessible to a national bank's customers. Although financial and economic considerations will encourage many financial institutions to enter nonproprietary sharing arrangements, consumers receive equal benefits from ATMs regardless of whether their depository institution owns or merely shares them.

The proprietary or shared nature of an ATM is also largely irrelevant to any analysis of whether ATMS should be regarded as branches or otherwise left to state control. Both arrangements, if established by national banks, have the potential of creating competitive disadvantages to state banks operating under restrictive state laws. However, in this particular area, states should not be given the authority to restrict the activities of national banks. To the extent a competitive disadvantage develops, state laws will have to change to losen the restrictions on state institutions.

The benefits of a federal law clearly authorizing a national bank to establish or share ATMs in any location are apparent from my previous analysis of the pre-Marine Midland status quo. By making the morass of conflicting ATM and branching laws of the states explicitly not applicable to national banks, ATMs should proliferate, to the benefit of consumers and, because of cost efficiencies, to the benefit of financial institutions.

To establish federal preemption over the establishment and functions of all ATMs, whether proprietary or nonproprietary, does not mean that states will lose control over the branching activities of national banks. There is an important distinction between bona fide branching, i.e., the establishment of brick and mortar factilities, and participating in statewide, regional and national ATM networks.

A bona fide branch provides a financial institution with a significant ability to attract new customers in the area where the branch is located. On the other hand, a bank is unlikely to attract many new accounts in an area where a customer can only access his deposit account within a reasonably convenient geographic area through an ATM terminal. Most consumers want to place their deposits with institutions from which they also can take major loans, including secured loans, that traditionally involve face-to-face transactions with a bank officer. Additionally, most consumers have a need for occasional face-to-face contact with their financial institution to register complaints, to deposit cash or to obtain, for example, a special exemption from a burdensome check deposit hold policy.

Those consumers who are willing to open accounts at banks that have no brick and mortar offices within their local community are already able to bank interstate through mail and wire facilities. It is unlikely that this type of consumer, one that does not require occasional face-to-face contact with his financial institution, will proliferate with the unrestricted development of ATMs.

In sum, Consumers Union rejects the argument that unrestricted ATM development will cause a radical restructuring of the banking industry similar to the impact of unrestricted branching. However, a federal remedy can be established to reverse the unexpected circumstance in which an ATM network significantly modifies the present banking structure by attracting new accounts to out-of-state depositary institutions. This federal remedy could allow the state in which the ATM network is located, or an injured bank, to petition a court or an administrative body to eliminate the out-of-state institution's participation in the network within that state or to terminate its authority to accept deposits through terminals located in the state.

THE EFFECT OF S. 2898

Unfortunately, S. 2898 does not totally achieve the desirable result of explicitly authorizing the unrestricted development by national banks of ATM networks throughout the United States. The bill reverses the impact of the *Marine Midland* decision and slightly improves the pre-decision status quo. But by essentially codifying the Comptroller regulation that was invalidated in the *Marine Midland* case, the bill perpetuates an incongruous across-the-board classification of proprietary ATMs as branches. Consequently, the establishment of these ATMS will continue to be inappropriately governed by state branching laws rather than by a nationally applicable law specifically designed to address ATMs.

The bill modifies the pre-Marine Midland status quo by affirmatively and explicitly stating that national banks may establish nonproprietary ATM sharing arrangements. This improves the pre-Marine Midland status quo, under which these sharing arrangements were only implicitly permissible under federal law and, as a result, were subject to state law restrictions. The bill's affirmative authorizaton of these arrangements under federal law should preempt the power of the states to limit their development. An intent to preempt the authority of the states as to both proprietary and shared ATMs should be clearly stated in the bill's legislative history.

THE EFFECT OF THE PROPOSED CSBS AMENDMENT

The amendments proposed by the Conference of State Bank Supervisors (CSBS) have two basic effects and purposes: First, the amendment to subsection (i)(1) will allow restrictive state laws to govern the "location, ownership, operation and permissible functions" of a shared ATM. Because we believe the development of ATM networks by national banks should be unimpeded by state laws, we strongly oppose this amendment.

Second, the CSBS amendments to subsections (i)(2)(A) and (B) seek to clarify the circumstances under which an ATM is to be treated as a branch under the McFadden Act. Because we believe that an ATM should never be treated as a branch and governed by state branching laws, we also strongly oppose this amendment.

CONCLUSION

The consumer interest is best served by the unimpeded development of ATM networks. Consequently, neither the branching nor the specific ATM laws of the individual states should apply to ATMs owned/by national banks or to sharing arrangements under which a national bank's customers are able to access a nonproprietary ATM.

S.2898 achieves part of this necessary goal by specifically authorizing national banks to share nonproprietary ATMs. It should be clarified in the legislative history of the bill that this authorization preempts any state law that restricts the ownership, location, operation or permissible functions of an ATM.

S. 2898 fails to allow the unrestricted development of ATMs by perpetuating the distinction between proprietary and nonproprietary ATMs, and by implicitly classifying proprietary ATMs as branches. The bill should be amended specifically to authorize national banks to use, and to permit their customers to use, ATMs without regard to ownership.

Senator **Trible**. Thank you very much for your testimony. Mr. Hannaford.

STATEMENT OF MARK HANNAFORD, PRESIDENT, BANKCARD HOLDERS OF AMERICA

Mr. **Hannaford**. Thank you, Senator, and I especially thank you and other members of the committee for rearranging things so that I could testify. I hope I didn't dislocate anyone's plans.

Senator **Trible**. We are pleased to have you here this morning, Mark.

Mr. **Hannaford**. I just spent a refreshing night on the airplane coming in from California and that's the reason I'm tardy.

I am, as you noted, Senator, now the president of BankCard Holders of America [BHA] and I want to thank you and the entire committee for allowing me the opportunity to submit testimony on behalf of our more than 100,000 members.

During the past 3 years, BHA has been educating consumers on the wise and careful use of credit and is dedicated to protecting the rights and interests of bank card consumers.

BHA monitors issues which may have a significant impact on bank card holders.

The Banking Convenience Act of 1984, S. 2898, which you have shown such distinguished leadership in presenting, is such an issue.

I would note that the BankCard Holders of America is not affiliated with any credit card company or financial institution. We are an independent, nonprofit organization supported solely by consumers through membership dues.

CONSUMERS WOULD BENEFIT BY PASSAGE OF S. 2898

It is our belief that an overwhelming majority of consumers would benefit by the passage of your bill.

I would ask for consent, Senator, that my entire statement be included in the record because previous testimony has already stated much of the definition of the reason for the legislation and the reason for our support of it and the need for it.

As you know, Senator, and members of the committee, the need for this legislation was dramatized by the *Marine Midland* case in New York State. If this ruling is allowed to stand, national banks will no longer be able to participate in shared ATM networks. Those who already are involved in shared systems would be considered in violation of the law. The ramifications of this decision are far reaching for the industry and consumers alike. Everyone would be the loser. Banks who have invested time, money, and effort in promoting these networks, the EFT industry which has spent large sums of money in developing and maintaining the equipment systems and technology needed, and consumers who would lose the convenience of using ATM systems.

Congress needs to act to encourage and continue the growth of ATM systems in the face of the recent court ruling which may carry additional unanticipated consequences which could be disadvantageous to consumers and to the banking industry.

The McFadden Act was enacted by Congress in 1927, long before technology existed to develop electronic transfer through automatic teller machines. The act defined the term branch as it related to banking to mean a place where "deposits are received, or checks paid, or money lent." In 1977 a U.S. court of appeals ruling implied that when an ATM which is neither owned or rented by a national bank is made available to the bank's customers on a fee basis, the ATM is not a branch of that bank. The Comptroller of the Currency adopted this reasoning and published a regulation on ATM's to this effect.

Neither the McFadden Act nor Senator Trible's bill speaks directly to the question of the States' rights to regulate banking activity. We understand the Independent Bankers Association hesitation to back S. 2898 under these circumstances. BHA supports the rights of States to regulate banking activity within their borders. In our view, New York and every State has the right to regulate ATM's and all other electronic transfer mechanisms within their State. However, in their regulatory activity, they must adhere to a national definition of ATM's and other new technological advances.

They must not apply other laws and regulations to these new banking activities.

Congressional action on this issue will influence more than just national banks and the future of their ATM systems. Though the New York court might not have anticipated it, their holding might logically be extended to the following circumstances:

Since I can bank through the mail, over the telephone, and in some cases through my home computer, would these instruments then be considered bank branches? Would their activities fall within the restrictions applied to bank branches?

Or if I have a Bank of New York VISA card and, while in Washington, go to Riggs Bank to get a cash advance, does Riggs then become a branch of the Bank of New York simply by providing me with such a loan? Would this then be considered interstate banking, subject to all of the legal and regulatory constraints in that area?

Or as point-of-sale terminals expand, would J.C. Penney become a branch bank if I use my card at their store?

The further development of ATM's will provide consumers with choices and options on how, where, and with whom they will bank. The free market should be allowed to shape the industry by meeting the demands of consumers. All banks should be encouraged to compete fairly on an equal basis without unreasonable restrictions.

Shared ATM networks permit a small town bank to offer its customers access to their money in hundreds of locations, helping them to provide services equivalent to those offered by big banks. Consumers employed in urban areas who commute from other cities, suburban areas or even other cities, have benefit by having access to one bank for their needs at home and another at work.

Congress should encourage this growing array of services which is expanding in the marketplace. This is an area where legislation or regulation may inhibit rather than enhance consumer interests.

CONSUMERS NEED PROTECTION FROM POTENTIAL ABUSES OF ATM'S

However, consumers still need protection from potential abuses of the system. In March of this year, the Federal Reserve Board requested comment on several changes it was considering in regulation E in the Truth-in-Lending Act. It was suggested that regulation E be expanded to include all electronic fund transfer transactions whether initiated electronically or on paper, require financial institutions to inform customers of EFT charges by itemizing the charges on periodic statements, and restrict the time for provisional recrediting to 10 business days and the time for ultimate error resolution to 45 to 90 days. The Federal Reserve Board has yet to act on this important issue.

We urge the Senate to take similar action to provide consumers with necessary consumer protection in the electronic fund transfer and automatic teller machine marketplace.

In summary, Senator, BHA supports this legislation and we thank you for your leadership in it. We support it because we agree with the Comptroller of the Currency's ruling that automatic teller machines do not and should not constitute branches of banks. We feel that States will retain the right to regulate ATM's, maintaining jurisdiction at the State level where it belongs, and that the current New York court ruling may carry unacceptable ramifications.

Two hundred shared ATM networks are currently in operation. An average of 60 million transactions per month are performed on these networks. Consumers clearly use them as a convenient and beneficial banking mechanism.

We support the continued growth of the industry by reaffirming the right of individual States to regulate these services. We appreciate your leadership in this, Senator, and the opportunity for us to offer this testimony on behalf of our membership.

[The complete statement follows:]

BANKCARD HOLDERS OF AMERICA
2025 EYE STREET, N.W., SUITE 1022, WASHINGTON, D.C. 20006
A non-profit consumers association dedicated to protecting the rights and interests of bank card holders.

TESTIMONY OF MARK HANNAFORD
PRESIDENT OF BANKCARD HOLDERS OF AMERICA,

My name is Mark Hannaford. I am a former Member of Congress and presently serve as President of Bankcard Holders of America (BHA). I want to thank Chairman Garn and the entire Committee for allowing me the opportunity to submit testimony on behalf of the more than 100,000 members of our organization. During the past three years, BHA has been educating consumers on the wise and careful use of credit and is dedicated to protecting the rights and interests of bank card consumers. BHA constantly monitors issues which may have a significant impact on bank card holders. The "Banking Convenience Act of 1984", (S.2989) introduced by Senator Trible, is such an issue.

It is important to note that Bankcard Holders of America is not affiliated with any credit card company or financial institution. We are an independent, non-profit organization supported solely by consumers through membership dues. It is our belief that the overwhelming majority of consumers would benefit by the passage of Senator Trible's bill.

After reading all the documents, and listening to today's testimony, it might appear that this is a very complicated and complex issue. The stakes appear to be high for the future of all interested parties -- the electronic fund transfer industry, the small independent bank, the large 'super' bank, and the consumer. In fact, though, Senator Trible's bill changes nothing. It merely maintains the eight-year old status quo as determined by the Comptroller of Currency, and by current banking industry and consumer practice.

Put simply, the Trible bill legislatively sanctions the view that an automatic teller machine (ATM) made accessible to customers of a national ATM system would not be considered a branch, as long as the national bank does not establish, own or rent the machine. The ATM would not be considered a branch under federal law, and would not be restricted by the McFadden Act or state branching laws.

The bill ensures that as long as the bank is "assessed transactional fees or similar charges for its use" the ATM would not be considered to be established by that bank.

In addition, Senator Trible's bill does not limit itself to ATMs. Throughout the bill, the term 'automated device' is used, with automated device defined to include (but not limited to) automatic teller machines, point-of-sale terminals, cash dispensing machines and customer bank communication terminals.

Bankcard Holders of America supports Senator Trible's bill with the changes suggested by the Conference of State Banking Supervisors (CSBS). We strongly agree with the CSBS modifications which:

- further clarify that national banks permit their customers to access shared systems as long as the systems are in compliance with all pertinent state laws affecting their operations;

- state that a device is not considered established by a national bank if the bank does not rent, own or control the device exclusively;

- propose that a national bank be presumed not to have established a device if fees are assessed (ie. transactional fees).

The CSBS changes would further define who can regulate the devices, how they can be used and what constitutes "establishment" of the machines. This would allow industry to move ahead with plans to expand automated device systems with guidelines necessary to make appropriate business decisions, without the fear of sudden changes in the accepted ways of building and running these systems. They also provide states with the necessary authority to regulate the devices.

The justification for this bill is clear. A standard, national definition of what constitutes a bank branch needs to be established. A recent legal case in New York State involving a shared ATM system used by customers of Marine Midland Bank and a small local bank makes a strong case for this legislation.

In this case (Independent Bankers Association of New York State, Inc. and the Canandaigua National Bank and Trust Company v. Marine Midland Bank, N.A.), a U.S. district court ruled that if a national bank's customer uses a third-party-owned ATM, that ATM becomes a branch of the national bank under the provisions of the McFadden Act. Since New York State (and over 25 other states with similar legislation) has a "home protection rule" which regulates branch banking, the court ruled that Marine Midland Bank was in violation of the New York statute.

If this ruling is allowed to stand, national banks will no longer be able to participate in shared ATM networks. Those who already are involved in a shared system would be considered in violation of the law. The ramifications of this decision are far-reaching for the industry and consumers alike. Everyone would come out the loser -- banks (who have invested time, money and effort in promoting these networks), the EFT industry (which has spent large sums of money in developing and maintaining the equipment, systems and technology needed), and consumers who have come to rely on the convenience of using ATM systems.

Congress needs to act quickly to encourage the continued growth of ATM systems in the face of the recent New York court ruling, which may carry additional, unanticipated consequences which could be disadvantageous to consumers and the banking industry.

The McFadden Act was enacted by Congress in 1927, long before technology existed to develop electronic fund transfer through automatic teller machines. The Act defined the term "branch" as it related to banking to mean a place of business where "deposits are received, or checks paid, or money lent." In 1977 a U.S. Court of Appeals ruling implied that when an ATM which is neither owned nor rented by a national bank is made available to the bank's customers on a fee basis, the ATM is not a branch of that bank. The Comptroller of Currency adopted this reasoning and published a regulation on ATMs to this effect. (12 U.S.C.36).

Neither the McFadden Act nor Senator Trible's bill speaks directly to the question of the states' rights to regulate banking activity. We understand the Independent Bankers Association's (IBA) hesitation to back S.2989 under these circumstances. BHA strongly supports the rights of states to regulate banking activity within their borders. In our view, New York and every state has the right to regulate ATMs and all other electronic transfer mechanisms within their state. However, in their regulatory activity, they must adhere to a standard national definition of ATMs and other new technological advances. It would be confusing and unreliable for states to apply inconsistent definitions and policies to these new banking activities.

Congressional action on this issue will influence more than just national banks and the future of their ATM systems. Though the New York court might not have anticipated it, their holding might logically be extended to the following circumstances:

- Since consumers can bank through the mail, over the telephone, and in some cases through their home computer -- would these instruments then be considered bank branches? Would their activities fall within the restrictions applied to bank branches?

- If I have a Bank of New York VISA card and, while in Washington, go to Riggs Bank to get a cash advance -- does Riggs then become a branch of the Bank of New York simply by providing me with such a loan? Would this then be considered interstate banking, subject to all of the legal and regulatory constraints in that area?

- As point-of-sale terminals expand, would J.C. Penny become a branch bank if I use my card at their store?

While these examples may seen far-fetched, they are within the realm of possibility. Without S.2989, a broad range of questions may be raised which could confuse and penalize both the consumers who use ATM-type services today, and the industries which support it.

In considering the future of ATMs, the pivotal question remains: What effect will changes in the current, accepted definition of ATM networks have on consumers? Though we don't necessarily advocate approving a trend in banking simply because it has already begun, we do think it is a valid argument in this case. ATMs are a development in the banking industry that help consumers across the board. Their existence provides a degree of consumer convenience which would simply not be possible without ATMs. ATMs offer consumers the ability to bank when, where and how they want to. Last week at the National Bank Card Conference in Washington, D.C., Mr. Frederick Deane, Jr., Chairman of the Bank of Virginia said, "Customers want two things in a (bank) account -- ease of deposit and utility. He (sic) wants a Seven-Eleven Bank."

Our increasingly mobile society makes ATM services as much a necessity as a convenience. Consumers may live in one area, work in another and find recreation in yet another location. Whether at home, work or play, consumers want and need access to their money after banking hours, away from their brick-and-mortar branch, and at times when the teller line is too long. Consumers have come to depend on the many advantages offered by ATM use. To discontinue such services now would be an unnecessary burden on consumers and industry alike.

We urge the Committee to act favorably and swiftly on S.2989. BHA supports the legislation for the following reasons:

- We agree with the Comptroller of the Currency's ruling that automatic teller machines do not and should not constitute branches of banks.
- States will retain the right to regulate ATMs, maintaining jurisdiction at the state level, where it belongs.
- The current New York court ruling may carry unacceptable ramifications.

Two hundred shared regional ATM networks are currently in operation. An average of sixty million transactions per month are performed on these networks. Consumers clearly use them as a convenient and beneficial banking mechanism. We support the continued growth of the industry, while reaffirming the right of individual states to regulate new services. With the CSBS modifications, Senator Trible's bill will provide legislators, industry and consumers with the answers they are looking for.

Senator **Trible**. Mr. Hannaford, you're most welcome, and we appreciate your kind words and valued testimony.

NEED TO FREE ATM'S FROM LIMITATIONS

Just two quick questions, if I might. First, Ms. Meier, you have argued I think quite persuasively for maximizing consumer choice and opportunity, and certainly I share those objectives. Here that argues for freeing all ATM's from limitations imposed by current Federal and State laws. And I share that objective as well.

However, it is my view that we are not going to be able to achieve that end result in this Congress, but it is quite possible for us to move quickly and achieve some incremental progress and eliminate the potentially destructive consequences of this recent Federal ruling.

To that end, do you support this initiative? I read your statement and hear your testimony to say that although you would like the Congress to go well beyond this legislation, that you view it as a positive step and that you support it as such. Is that correct?

Ms. **Meier**. That is a correct interpretation.

Senator **Trible**. Thank you.

Mr. Hannaford, you, too, have expressed support for this legislative initiative, but have expressed some preference for the inclusion of the amendments put forward by the Conference of State Bank Supervisors. I must say that position is contrary to the position taken by most all the other witnesses who expressed some concerns about those amendments.

For example, the American Bankers Association witness yesterday complained that the CSBS amendments would lead to 50 different sets of State laws governing a whole host of factors and further complicate the provision of ATM services to the consuming public.

I don't want to get into the merits of all that and certainly a reasonable person could support those amendments, but the question I do want to pose to you is this. Do you support this legislation as introduced if the alternative is no action at all, and possibly the affirmation of the *Marine Midland* ruling? I read your statement and hear your testimony saying that you would and you do, and I wanted to clarify that for the record.

Mr. **Hannaford**. Yes, we certainly do, Senator.

Senator **Trible**. Fine. Thank you for being here today and we look forward to working with you as we seek to achieve more ambitious goals and objectives in the days ahead.

The hearing is adjourned.

[Whereupon, at 11:10 a.m., the hearing was adjourned.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

BANK OF AMERICA

F R TALBOTT
Senior Vice President

September 24, 1984

The Honorable Paul S. Trible
U.S. Senate
Washington, D.C. 20510

Dear Senator Trible:

Bank of America supports your efforts to obtain Federal legislation to permit national banks to continue to participate in shared Automated Teller Machine ("ATM") networks. We agree with you that the District Court decision in the case of *Independent Bankers Association of New York v. Marine Midland Bank (Wegman's)*, if upheld on appeal, could adversely affect consumers. That decision might severely restrict the ability of national banks to participate in existing national or regional shared ATM networks. Our customers obviously would lose, and national banks would be placed at a severe competitive disadvantage.

Bank of America is a member of the PLUS System, a nationwide network of shared ATM's. Our customers value the convenient access to their accounts at ATM's across the nation which the PLUS System provides. Moreover, this Bank and four others in California plan to establish a point-of-sale electronic payment network within this state, using shared terminals, some of which may be established by retailers. The *Wegman's* decision, if upheld, could threaten the viability of both of these endeavors.

For those reasons, we support the concept of preserving the *status quo* that existed before the *Wegman's* decision. Federal legislation should codify the rulings and interpretations of the Comptroller of the Currency which led to national bank participation in existing shared ATM networks. Legislation with this effect would preserve the existing ATM networks for the benefit of American consumers. Moreover, by clarifying the current situation, it would foster the future growth of these networks and the development of additional ones.

Bank of America appreciates your leadership and that of Senator Humphrey in introducing legislation intended to address the problem created by the *Wegman's* decision. We are hopeful that legislation restoring *the status quo ante* can be enacted in the short time remaining in this Congress.

Sincerely,

Fenton R. Talbott
Senior Vice President

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION · BOX 37000 · BANK OF AMERICA CENTER · SAN FRANCISCO CALIFORNIA 94137

Credit Union National Association, Inc.
1730 RHODE ISLAND AVE. N.W. • WASHINGTON D.C. 20036 • 202-828-4500

JAMES C. BARR, CAE
EXECUTIVE VICE-PRESIDENT & DIRECTOR
GOVERNMENTAL AFFAIRS DIVISION

October 4, 1984

The Honorable Jake Garn
Chairman
Committee on Banking, Housing,
and Urban Affairs
534 Dirksen Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Credit Union National Association (CUNA) represents 19,000 state and federally chartered credit unions through 52 state credit union leagues, which serve more than 50 million individual members. We appreciate the opportunity to submit our comments for the record in support of S.2898, the "Banking Convenience Act of 1984." CUNA supports this legislation because it would ensure the future viability of shared electronic funds transfer systems. For many years, CUNA has opposed categorizing off-premise automated teller machines (ATMs) as branches because it incorporates the legal restrictions placed on brick and mortar facilities on the development of electronic fund transfer systems. In addition, we have supported sharing of electronic fund transfer systems by all financial institutions.

In the recent U.S. District Court decision, *Independent Bankers Association of New York State v. Marine Midland Bank*, the court held that a shared automated teller machine (ATM) owned by a supermarket but used by the customers of Marine Midland Bank was a branch of the national bank and subject to the branching restrictions of the McFadden Act. However, in 1976, the U.S. Court of Appeals for the District of Columbia Circuit ruled that ATMs must be *owned or rented* by a national bank in order to be considered branches for purposes of the McFadden Act. *Independent Bankers Associaton of Amercia v. Smith*, 534 F.2d 921 (D.C. Cir 1976). The Comptroller of the Currency subsequently clarified the *Smith* decision by issuing regulations explaining that an ATM not owned or rented by a national bank was not a branch for McFadden Act purposes. Based on this body of law developed over eight years ago, financial institutions have invested in excess of a billion dollars to develop more than 200 shared regional networks and seven national networks.

This case calls into question the future of shared ATM systems because it would prevent customers of national banks from accessing their accounts through a shared ATM system. S.2898, as introduced by Senators Trible and

Humphrey, would overturn this ruling and codify the Comptroller of the Currency's regulation that permits national banks to use shared ATM's for a fee as long as the bank does not own or rent the ATM. CUNA supports this legislation because it would maintain the status quo of the law prior to the Marine Midland decision. We feel that this legislation is critical in ensuring the future development of shared systems.

Although the Marine Midland case does not directly affect the authority of federally and state chartered credit unions to participate in shared ATM systems, credit unions will be significantly affected if the case is upheld on appeal. Shared ATM systems directly benefit credit unions and their members. Most credit unions are relatively small -- over half of the 20,000 credit unions in the United States have less than $1 million in assets. As small financial institutions, network sharing allows credit unions to participate in these systems due to the lower costs associated with economies of scale. The volume of transactions conducted through an ATM will usually justify a proprietary interest in an ATM network for larger depository institutions. Since the initial set-up costs of a network are prohibitive for most credit unions, the most economical alternative is to participate in shared systems. These networks have the capacity to increase transaction volume, which results in substantial cost savings per transaction. Thus, participation in shared systems allows credit unions to compete with larger institutions by providing reasonably priced ATM services through shared networks.

Although some credit unions have in fact invested in proprietary ATMs, many credit unions participate or plan to participate in shared systems. For instance, of the 744 financial institution members of one regional network, approximately 310 of the participants are credit unions. Although CUNA does not collect statistics on the total number of credit unions that participate in shared systems, we do know that many credit unions plan to participate in the future and that sharing is considered a vital component for credit unions to be competitive with other financial institutions in the future.

If the Marine Midland decision is upheld on appeal or S.2898 is not enacted by Congress, many national banks subject to the jurisdiction of the United States Court of Appeals for the Second Circuit will be forced to withdraw from the networks. In addition, this decision creates a precedent for additional suits throughout the country which could destroy the viability of shared systems nationwide. If national banks leave the shared networks, the transaction fees for credit unions and other participating financial institutions will increase substantially. This would clearly have a detrimental effect on credit unions' ability to offer electronic funds services to their members. Many credit unions would forego offering ATM service altogether which ultimately effects the consumer. Many credit unions have a membership base that is dispersed across state lines and, in some cases, nationwide. These members rely on ATMs to conduct financial transactions with their credit union and clearly they will increase their usage of ATM services in the future as credit unions link up to shared systems. If this type of service is not available from credit unions, many members will obtain ATM services from other competing financial institutions.

The conference of State Bank Supervisors has submitted proposed amendments to S. 2898 that would subject shared national bank ATMs to "all pertinent state laws regarding location, ownership, operation, and permissible functions." This language could result in greater state restrictions on the use of shared networks by national banks. Instead of maintaining the status quo, this proposal could ultimately subject national banks to greater state restrictions for shared ATMs. CUNA opposes these amendments submitted by CSBS because it represents a step backwards, which could result in a patchwork of state laws regarding the use of shared systems.

CUNA appreciates the opportunity to submit these comments for the record.

Sincerely,

James C. Barr, C.A.E.

GH

Scott L Engle

MoneyMaker EFT Services

1984 [illegible] 4: 22

September 13, 1984

The Honorable Jake Garn
505 Dirksen Building
First and C Streets, NE
Washington, D.C. 20510

Dear Senator Garn:

I am writing to urge your support for passage of Bill S.2898 prior to adjournment. The Banking Convenience Act, introduced by Senators Paul Trible (R - VA) and Gordon Humphrey (R - NH) on August 1, would overturn a recent New York District Court ruling (IBANYS v. Marine Midland Bank). This ruling held that an automated teller machine (ATM) owned by a supermarket and used by Marine Midland customers as part of a shared network arrangement is a branch subject to state branching restrictions. The proposed legislation specifies that an ATM used by customers of a national bank, but not owned by the bank, is not a branch under federal law.

The continued growth of electronic banking is the single most vital ingredient in delivering lower cost, higher quality financial services to all consumers.

As the nation's largest financial and non-financial institutions vigorously compete for the investment dollars of middle and upper-income Americans, increased attention has been given to the need for minimum levels of financial services to be made available to all consumers. Such services have come to be known as "lifeline" services. Technology offers us the best opportunity to deliver lifeline services at prices which are affordable and which give the provider a reasonable return on investment. First Texas Savings, through its 7-Eleven project in Texas, is installing ATMs in urban neighborhoods which heretofore have had few, if any, such devices. As one might expect, initial usage in these neighborhoods has been very low; however, we are committed to making it work. Only the substantial economies of scale that accrue to us from participating in shared networks enable us to undertake such a project. If the New York decision is upheld on appeal and not overturned by Congress, only the very largest institutions in the country will be able to build low-cost, wide-spread electronic delivery systems, leaving decisions regarding lifeline services in the hands of a few.

Too often, issues confronting the electronic funds transfer industry are presented as struggles between industry groups and debated as such. The good of the consuming public is often overlooked or dismissed as irrelevant. Electronic technology is a tool which we can use to improve the quality of life for us all and mis-guided attempts to forestall its development must be turned back.

I would be very happy to discuss this further with you or your staff if it would help to clarify the admittedly confusing subject of EFT networks. I plan to be in Washington early the week of September 24 at the annual meeting of the EFT association and would welcome the opportunity to meet with you on this matter.

The New York ruling, if not overturned, would seriously impede or even destroy the growth of EFT networking in America, thereby working to the detriment of all consumers.

I urge your support for the Banking Convenience Act.

Sincerely,

Scott L. Engle